SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 157.

THOMAS C. POWER, JAMES McGARRY, WILLIAM M. REES, ANDREW M. JOHNSON, AND JOSEPH V. McKNIGHT, APPELLANTS,

vs.

ISAAC G. BAKER, JOHN T. MASSIE, WILLIAM G. CONRAD, AND CHARLES E. CONRAD, OWNERS OF THE STEAMER "COLONEL McLEOD."

FILED OCTOBER 23, 1884.

No. 307.

ISAAC G. BAKER, JOHN T. MASSIE, WILLIAM G. CONRAD, AND CHARLES E. CONRAD, OWNERS OF THE STEAMER "COLONEL McLEOD," APPELLANTS,

vs.

THOMAS C. POWER, JAMES McGARRY, WILLIAM M. REES, ANDREW M. JOHNSON, AND JOSEPH V. McKNIGHT.

FILED SEPTEMBER 25, 1885.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 8, 1887.

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1 In the United States Circuit Court in and for the District of Minnesota. In Admiralty.

ISAAC G. BAKER, JOHN T. MASSIE, WILLIAM G. CONRAD, and Charles E. Conrad, Owners of the Steamer Colonel McLeod, Libellant- & Respondent-,

against

THOMAS C. POWER, JAMES MCGARRY, WILLIAM M. REES, ANDREW M. JOHNSON, and JOSEPH V. MCKNIGHT, Appellants.

By the Honorable R. R. Nelson, *ex officio*, one of the judges of circuit court of the United States for the district of Minnesota.

To Isaac G. Baker, John T. Massie, William G. Conrad, and Charles E. Conrad, the above-named libellants and respondents:

Whereas Thomas C. Power, James McGarry, William M. Rees, Andrew M. Johnson, and Joseph V. McKnight have lately appealed to the Supreme Court of the United States from a judgment
2 and decree lately rendered in the circuit court of the United States for the district of Minnesota, in the 8th circuit, made in your favor and against the said Thos. C. Power *et al.*, and has filed the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, in the District of Columbia, on the 13th day of October, 1884, next to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Saint Paul, in the district of Minnesota, in the eighth circuit, this fourteenth day of January, A. D. 1884, and of the Independence of the United States the one hundred and eighth.

R. R. NELSON, *Judge.*

3 UNITED STATES OF AMERICA, *District of Minnesota,* } ss:

E. S. Gorman came before me, and, being first duly sworn, doth depose and say that at Saint Paul, in said district of Minnesota, on the 14th day of January, A. D. 1884, he served on Messrs. Williams & Davidson, proctors for said appellees, the foregoing citation and also a notice of appeal in the foregoing-entitled cause by then and there handing to and personally leaving with said Williams, a member of the said firm of Williams & Davidson, a true and correct copy of said citation and of said notice of appeal and of each of the same, and also on the 15th day of January, A. D. 1884, filing with the clerk of said circuit court in and for said district of Minnesota the said notice of appeal and citation; that each and all of said appellees are non-residents of the said district of Minnesota, and, as deponent verily believes, cannot be found within said district; and
4 further this deponent saith not.

E. S. GORMAN.

Subscribed and sworn to before me this 15th day of January, A. D. 1884.

[Notarial Seal, Ramsey Co., Minn.]

DANIEL B. VERMILYE,
Notary Public, Ramsey Co., Minnesota.

[Endorsed:] Ent. 9 ad. United States circuit court, district of Minn. Isaac G. Baker *et als.* against Thomas C. Power *et als.* Citation. Filed Jan'y 15, '84. Oscar B. Hillis, clerk.

5 Circuit Court of the United States of America in and for the District of Minnesota.

ISAAC G. BAKER *et al.*, Appellees,

vs.

THOMAS C. POWER *et al.*, Appellants.

Know all men by these presents that we, Thomas C. Power, Samuel T. Hauser, Edward W. Knight, John M. Sweeney, and Matthew Carroll, are held and firmly bound unto the above-named Isaac G. Baker, John T. Massie, William G. Conrad, and Charles E. Conrad in the sum of twenty thousand dollars, to be paid to the said appellees; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of October, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas the above-named appellants have presented an appeal to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, to reverse the decree rendered in the above suit by the circuit court of the United States for the district of Minnesota:

Now, therefore, the condition of this obligation is such that if the above-named appellants shall prosecute their appeal to effect and answer all damages and costs if they fail to make their appeal good, including all just damages for delay and costs and interest on appeal, then — obligation shall be void; otherwise the same

6 shall be and remain in full force and virtue.

In witness whereof we have hereunto set our hands and seals the day and year last above written.

THOMAS C. POWER. [SEAL.]
SAMUEL T. HAUSER. "
EDWARD W. KNIGHT. "
JOHN M. SWEENEY. "
MATTHEW CARROLL. "

Signed, sealed, and delivered in the presence of—
MASSENA BULLARD.

Approved December 21st, 1883.

GEO. W. McCRARY,
Circuit Judge.

TERRITORY OF MONTANA, *County of Lewis & Clarke,* } ss:

Samuel T. Hauser, Edward W. Knight, John M. Sweeney, and Matthew Carroll, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of five thousand dollars over and above all his just debts and liabilities.

S. T. HAUSER.
E. W. KNIGHT.
JOHN M. SWEENEY.
MATTHEW CARROLL.

Subscribed and sworn to before me this 14th day of ——— ———.
[NOTARIAL SEAL.] MASSENA BULLARD,
Notary Public.

Endorsed. Filed December 21st, 1883. Oscar B. Hillis, clerk.

7 UNITED STATES OF AMERICA:

District Court of the United States, District of Minnesota.

I, William A. Spencer, clerk of said district court, do hereby certify and return to the honorable the circuit court of the United States for the district of Minnesota that the foregoing, consisting of — pages, numbered consecutively from 1 to —, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final decree, and all other proceedings in said cause and of the whole thereof as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included in said paging the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 13th day of December, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh year.

[Seal of U. S. Dist. Court.]

WM. A. SPENCER, *Clerk.*

8 UNITED STATES OF AMERICA, *District of Minnesota:*

United States District Court for the District of Minnesota. In Admiralty.

To the Hon. R. R. Nelson, judge of the district court of the United States for the district of Minnesota:

Isaac G. Baker, John T. Massie, of St. Louis, Missouri, and William G. Conrad and Charles E. Conrad, of Fort Benton, Montana Territory, owners of the steamer Colonel Macleod, exhibit this their libel against Thomas C. Power, of Helena, Montana Territory; James McGarry, of Sioux City, Iowa; William M. Rees, of Pittsburgh, Pennsylvania; Andrew M. Johnson, of Leavenworth, Kansas, and Joseph

H. McKnight, of Fort Shaw, Montana Territory, late owners of the steamer Butte, in case of maritime tort, and doth allege and articulately propound as follows, to wit:

First. That the steamer Butte was a vessel of twenty tons burden and upwards, regularly licensed and enrolled under act of Congress, and registered at Pittsburgh, Pennsylvania, and was owned by the aforesaid respondents during the month of November, 1879.

9 Second. That the steamer aforesaid was a passenger and freight vessel, employed in transporting passengers and freight to and from points on the Missouri river, under the command, control, and management of her captain and part owner, Andrew M. Johnson.

Third. That the libellants aforesaid owned and operated the steamer Colonel Macleod, a passenger and freight vessel between points on the Missouri river, and that the steamer last aforesaid was licensed and enrolled according to the act of Congress and registered at St. Louis, Missouri, and was a vessel of twenty tons burden and over.

Fourth. That on or about the 17th day of November, 1879, the aforesaid owners of the steamer Butte hauled their vessel out on certain marine ways and docks situated at or near Bismarck, Dakota Territory, and after hauling her out, in order to keep her from sliding back into the river, they propped and stayed the said steamer, but did such propping and staying so carelessly, negligently, and unskillfully that the said steamer broke down the aforesaid props and stays, slid into the river, and, without any default, negligence, and unskillfulness on the part of the owners and crew of the

10 said Colonel Macleod, collided with the said Colonel MacLeod and completely wrecked and sunk her.

Fifth. That the necessary expenses incurred by the owners of the said Colonel MacLeod in their endeavors to raise her were four thousand three hundred and thirty-three & $\frac{55}{100}$ dollars; that by their efforts the aforesaid owners recovered portions of the aforesaid vessel and certain portions of her furniture and machinery, the value of which was one thousand and ninety-three dollars ($1,093), and no more; that the steamer Colonel MacLeod, on the day that she was wrecked and sunk by the steamer Butte, was, at a fair and just valuation, worth fourteen thousand dollars ($14,000).

Sixth. That by said collision, growing out of the negligence, carelessness, and unskillfulness of the aforesaid owners of the steamer Butte, the libellants sustained a loss and were damaged to the amount of seventeen thousand two hundred and forty & $\frac{55}{100}$ dollars and interest on the same from November, 1879.

Seventh. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libellants pray that a warrant in due form

11 of law may issue to the marshal of the district aforesaid, commanding him to arrest the said Thomas C. Power, one of the owners of the steamer Butte, and to have him forthcoming before

this honorable court on such day, to be inserted in the warrant, as this honorable court shall direct, and then and there to cause him to execute a bond, with good and sufficient security, in the sum of thirty thousand dollars, conditioned that he will appear before this court, answer this libel, will abide its orders, and pay the damages awarded the aforesaid libellants on its final decree for the loss sustained by them from the aforesaid collision, and that this honorable court will decree such other and further relief, together with the costs, expenses, and disbursements about this suit expended by said libellants, as to right and justice appertains and as this court is competent to give.

I. G. BAKER & CO., *Libellants.*
WILLIAMS & DAVIDSON,
Proctors for Libellants, St. Paul, Minnesota.

STATE OF MISSOURI, } ss:
City of St. Louis, }

UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

12 Isaac G. Baker came before me personally, and, being duly sworn, doth say that he is one of the libellants in the above-entitled action; that the foregoing pleading is true, of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

ISAAC G. BAKER.

Subscribed and sworn to before me on this 14th day of June, A. D. 1881, at office, in city of St. Louis, Mo.

[SEAL.] WM. MORGAN,
Comm'r U. S. Circuit Court Eastern District of Missouri.

On filing the within libel and otherwise complying with the rules of the court let a warrant of arrest issue in this cause against the defendant, Thomas C. Power, and let him be held to bail in the sum of five thousand dollars ($5,000.00).

R. R. NELSON, *Judge.*

13 [Endorsed:] United States district court, district of Minnesota. Isaac G. Baker *et al. vs.* Thomas C. Power *et al.* Libel. Filed this 1st day of July, A. D. 1881. Wm. A. Spencer, clerk. Williams & Davidson, proctors, St. Paul, Minn.

14 STATE OF MINNESOTA, } ss:
County of Ramsey, }

United States District Court for the District of Minnesota. In Admiralty.

ISAAC G. BAKER *et al. vs.* THOMAS C. POWER *et al.*

James H. Davidson came before me personally, and, being duly sworn, doth say that, to the best of his knowledge, information, and

belief, Thomas C. Power is a resident of Montana Territory, and that the said Power has no property within the jurisdiction of this court, and doth state that it is proper and right that a warrant of arrest should issue against the said Thomas C. Power to bring him before this honorable court and cause him to give bond that he will appear and answer the libel in the above-stated case and abide the orders of this court and pay the damages awarded the aforesaid libellants on its final decree.

JAMES H. DAVIDSON.

Subscribed and sworn to before me this 1st day of July, 1881.
[SEAL.] HENRY P. GOODNOW,
Notary Public, Ramsey Co., Minn.

15 [Endorsed:] U. S. district court, dist. of Minnesota. Isaac G. Baker *et al. vs.* Thomas C. Power *et al.* Affidavit showing the propriety of issuing a warrant of arrest. Filed July 1, 1881. Wm. A. Spencer, cl'k, by I. N. Cardozo, deputy. Williams & Davidson, proctors for libellants, St. Paul, Minn.

16 *Stipulation Entered into Pursuant to the Rules of Practice of this Court.*

District Court of the United States of America for the District Minnesota.

Whereas a libel was filed in this court on the 1st day of July, in the year of Lord one thousand eight hundred and eighty-one, by Isaac G. Baker, John T. Massie, William G. Conrad, and Charles E. Conrad against Thomas C. Power, James McGarry, William M. Rees, Andrew M. Johnson, and Joseph McKnight in a cause — maritime tort, for the reasons and causes in said libel mentioned, and praying that a warrant of arrest may issue against said Thomas C. Power and Henry L. Williams and James H. Davidson, of the city of St. Paul, Minnesota, sureties, and the said libellants, the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the libellants or their sureties execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars ($250); now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern that the stipulators shall be and are bound in the sum of two
17 hundred and fifty dollars ($250), conditioned that the libellants above named shall pay such costs as shall be awarded against them by this court or in case of an appeal by the appellate court.

JAMES H. DAVIDSON.
HENRY L. WILLIAMS.
ISAAC G. BAKER,
I. G. BAKER & CO.,
By WILLIAMS & DAVIDSON,
Proctors.

Taken and acknowledged this 14th day of June, 1881, before me—
[SEAL.] WM. MORGAN,
U. S. Commissioner, Eastern District of Missouri.

DISTRICT OF MINNESOTA, *ss:*

Henry L. Williams and James H. Davidson, parties to the above stipulation, being duly sworn, doth depose and say that they are worth the sum of five hundred dollars over and above all their just debts and liabilities.

——— ———.
——— ———.

Sworn this 16th day of June, 1881, before me—
[SEAL.] HENRY P. GOODENOW,
Notary Public, Ramsey County, Minnesota.

18 [Endorsed:] U. S. district court, district of Minnesota. Isaac G. Baker *et al. vs.* Thomas C. Power *et al.* Libellants' stipulation for costs. Stipulation approved. R. R. Nelson, U. S. district judge. Filed July 1, 1881. Wm. A. Spencer, clerk, by I. N. Cardozo, deputy. Williams & Davidson, proctors for libellants, St. Paul, Minn.

19 UNITED STATES OF AMERICA, *District of Minnesota,* } *ss:*

The President of the United States of America to the marshal of the district of Minnesota, Greeting:

Whereas a libel has been filed in the district court of the United States for the district of Minnesota, on the 1st day of July, in the year of our Lord one thousand eight hundred and eighty-one, by Isaac G. Baker, John T. Massie, of St. Louis, Missouri, and Wm. G. Conrad, Chas. E. Conrad, of Fort Benton, Montana Terr., owners of the steamer Col. McLeod, against Thomas C. Power, of Helena, Montana Terr'y; James McGarry, of Sioux City, Iowa; Wm. M. Rees, of Pittsburgh, Pa.; Andrew M. Johnson, of Leavenworth, Kansas, and Joseph H. McKnight, of Fort Shaw, Montana Terr'y, in a certain action, civil and maritime, for a collision therein alleged; that said libellants sustained a loss amounting to seventeen thousand two hundred and forty $\frac{55}{100}$ dollars and interest on the same from November, 1879, and praying that a warrant of arrest may issue against the said defendant, Thomas C. Power:

Now, therefore, we do hereby empower and strictly charge and command you, the said marshal, that you take and arrest the
20 said defendant, if he shall be found in your district, and him safely keep, so that you may have his body before the said district court on the first Monday in August, A. D. 1881, at the court-house in the city of Saint Paul, to answer the said libel and to make his allegations in that behalf; and have you then and there this writ with your return thereon.

Witness the Hon. R. R. Nelson, judge of said court, at Saint Paul, in said district, this first day of July, A. D. 1881.

[SEAL.] WM. A. SPENCER, *Clerk*,
By I. N. CARDOZO, *Dep'y*.

The marshal will hold the respondent to bail in the sum of $5,000.00.

St. Paul, July 1, 1881.

WM. A. SPENCER, *Clerk*,
By I. N. CARDOZO, *Dep'y*.

I certify that on the 2d day of July, 1881, at St. Paul, in my district, I arrested the within-named Thomas C. Power. Subsequently, having received a bond in the sum of five thousand dollars ($5,000), conditioned that the said Thomas C. Power should abide the decree of the court in this cause, I discharged the said defendant
21 from arrest and return the said bond herewith.

St. Paul, July 5, 1881.

R. N. McLAREN,
U. S. Marshal.

U. S. M. fees	$2 00
Mileage	26
Discharge	50
	$2 76

22 [Endorsed:] United States of America, district of Minnesota. Isaac G. Baker *et al. vs.* Thomas C. Power *et al.* Warrant of arrest. Filed July 5, 1881. Wm. A. Spencer, clerk.

23 Know all men by these presents that we, Thomas C. Power, Patrick H. Kelly, and Joseph Leighton, are held and firmly bound unto Robert N. McLaren, marshal of the district of Minnesota, in the sum of five thousand dollars, lawful money of the United States of America, to be paid to the said Robert N. McLaren, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 2d day of July, A. D. 1881.

Whereas a libel has been filed in the district court of the United States for the district of Minnesota, on the 1st day of July, 1881, by Isaac G. Baker, John T. Massie, William G. Conrad, and Charles E. Conrad against the above-bounden Thomas C. Power and others in a certain action, civil and maritime, to wit, wherein the said plaintiffs claim to have suffered damage to the amount of seventeen thousand two hundred and forty $\frac{55}{100}$ dollars:

The condition of this obligation is such that if the above-bounden Thomas C. Power shall appear in the said suit before the said district court of the United States for the district of Minnesota,
24 on the 1st Monday in August, A. D. 1881, at the court-house in the city of St. Paul, and abide by all orders of the court,

interlocutory or final, in the cause and pay the money awarded by the final decree rendered therein in said court or in any appellate court, then the above obligation to be void; otherwise to remain in full force and virtue.

THOMAS C. POWER. [SEAL.]
PATRICK H. KELLY. [SEAL.]
JOSEPH LEIGHTON. [SEAL.]

Sealed and delivered in presence of—
H. A. WILSON.
C. S. BUNKER.

STATE OF MINNESOTA, }
District of Minnesota, County of Ramsey, } ss:

Patrick H. Kelly and Joseph Leighton, being duly sworn, doth each for himself say that he resides at the city of St. Paul, in the State of Minnesota, and that he is worth the sum of ten thousand dollars over and above his just debts and liabilities.

JOSEPH LEIGHTON.
PATRICK H. KELLY.

Subscribed and sworn to before me this 2d day of July, 1881.
[SEAL.] CHAS. S. BUNKER,
Notary Public, Ramsey Co.

25 [Endorsed:] U. S. district court, district of Minnesota. Isaac G. Baker *et al. vs.* Thomas C. Power *et al.* Bond of Thos. C. Power, with Patrick H. Kelly and Joseph Leighton as sureties. Filed July 5, 1881. Wm. A. Spencer, clerk.

26 UNITED STATES OF AMERICA, }
District of Minnesota, } ss:

The President of the United States of America to the marshal of the United States for the district of Minnesota, Greeting:

Whereas a libel has been filed in the district court of the United States for the district of Minnesota, on the 1st day of July, A. D. 1881, by Isaac G. Baker, John T. Massie, William G. Conrad, and Charles E. Conrad against Thomas C. Power, James McGarry, William M. Rees, Andrew M. Johnson, and Joseph H. McKnight in a certain action, civil and maritime, for a maritime tort for damages therein alleged to be due the said libellants, amounting to seventeen thousand two hundred and forty $\frac{55}{100}$ dollars and interest on the same from November, 1879, and praying that a monition may issue against the said defendants pursuant to the rules and practice of this court:

Now, therefore, we do hereby empower and strictly charge and command you, the said marshal, that you cite and admonish the said defendants, if they shall be found in your district, that they be and appear before the said district court on the first Monday of

August, A. D. 1881, at 10 o'clock in the forenoon, at the cham-
27 bers of the judge of said court, in the custom-house at St. Paul, in said district, then and there to answer the said libel and to make their allegations in that behalf; and have you then and there this writ, with your return thereon.

Witness the Honorable Rensselaer R. Nelson, judge of said court, this first day of July, in the year of our Lord one thousand eight hundred and eighty-one, and of our Independence the 105th.

[SEAL.] WM. A. SPENCER, *Clerk*,
By I. N. CARDOZO, *Deputy*.

WILLIAMS & DAVIDSON,
Proctors for Libellants.

DIST. OF MINN.:

I return that I served this monition on Thomas C. Power personally, at St. Paul, July 18, 1881, by handing to and leaving a true copy thereof with C. D. O'Brien, attorney for defendant.

R. N. McLAREN,
U. S. Marshal.

U. S. marshal fees, $2.06.

28 [Endorsed:] U. S. district court, district of Minnesota. Isaac G. Baker *et al. vs.* Thomas C. Power *et al.* Monition. Returnable 1st Monday in August, 1881. Filed July 5, 1881. Wm. A. Spencer, clerk. Williams & Davidson, proctors for libellants.

29 UNITED STATES OF AMERICA, *District of Minnesota*:

The United States District Court in and for the District of Minnesota.
In Admiralty.

ISAAC G. BAKER, JOHN T. MASSIE, of St. Louis, Missouri; WILLIAM G. Conrad and Charles E. Conrad, of Fort Benton, Montana Territory, Owners of the Steamer Colonel McLeod,

vs.

THOMAS C. POWER, Montana Territory; JAMES MCGARRY, of Sioux City, Iowa; William M. Rees, of Pittsburgh, Pennsylvania; Andrew M. Johnson, of Leavenworth, Kansas, and Joseph N. McKnight of Fort Shaw, Montana Territory, Late Owners of the Steamer "Butte," in Case of Maritime Tort.

SIRS: You will please take notice that we have been retained by and hereby enter our appearance as proctors for the defendants, Thomas C. Power, William M. Rees, Andrew M. Johnson, and Joseph N. McKnight, in the above-entitled action.

30 St. Paul, Minne., July 28th, 1881.

O'BRIEN & WILSON,
Proctors for the Defendants Named Herein.

To Wm. A. Spencer, Esq., clerk of said court, & Messrs. Williams & Davidson, proctors for libellants.

[Endorsed:] U. S. district court, district of Minnesota. Isaac G. Baker *et al. vs.* Thomas C. Power *et al.* Service hereof is hereby admitted this 28th day of July, A. D. 1881. Williams & Davidson, proctors for libellants. Filed July 28, 1881. Wm. A. Spencer, clerk of court, by I. N. Cardozo, deputy. O'Brien & Wilson, proctors for defendants.

31 UNITED STATES DISTRICT COURT, *District of Minnesota:*

In the District Court of the United States. In Admiralty.

ISAAC G. BAKER, JOHN T. MASSIE, of St. Louis, Missouri; William G. Conrad and Charles E. Conrad, of Fort Benton, Montana Territory, Owners of the Steamer Colonel McLeod,

vs.

THOMAS C. POWER, Montana Territory; JAMES MCGARY, of Sioux City, Iowa; William M. Rees, of Pittsburgh, Pennsylvania; Andrew M. Johnson, of Leavenworth, Kansas, and Joseph H. McKnight, of Fort Shaw, Montana Territory, Late Owners of the Steamer Butte, in Case of Maritime Tort.

To the Honorable R. R. Nelson, judge of the district court of the United States for the district of Minnesota:

Thomas C. Power, William M. Rees, Andrew M. Johnson, and Joseph H. McKnight, of the defendants above named, for their answer to the libel exhibited against them in the above-entitled action, do articulately propound and allege as follows:

32 First. The said defendants admit the first, second, and third articles contained in said libel, except in this, that they allege long prior to the filing and exhibition of said libel the said James McGarry mentioned therein had died, and that he was in his lifetime a part owner in the steamer "Butte" named in said libel.

Second. They deny each and every averment and allegation contained in the fourth article of said libel, and that they deny that these defendants hauled out the said steamer "Butte" on the marine ways and docks mentioned in the libel or upon any other marine ways or docks anywhere else, or that they propped or staged said steamer as stated in the said libel, or that by reason of any negligence or carelessness on the part of the owners of said steamer "Butte" or of any other crew that the said steamer "Butte" collided with the steamer "Colonel McLeod" as stated in said libel.

Third. These defendants aver that they have no knowledge or information thereof sufficient to enable them to form a belief as to whether the libellants ever expended any sum of money whatever or incurred any expense whatever in endeavoring to raise the

33 said steamer "Colonel McLeod," or as to whether they did recover any portion of her or of her tackle or machinery as stated in the fifth article in said libel, or as to what was the value of the said "Colonel McLeod," and denies that she was of the value of $14,000 or of any value whatever.

Fourth. And, for answer to the 6th article of said libel, the defendants deny that said collision grew out of or was caused by the

negligence, carelessness, or unskillfulness of these defendants, or that, by reason of any omission upon the part of these defendants, the libellants suffered loss or were damaged in the sum of $\$17{,}240\frac{55}{100}$, or in any sum or amount whatever.

Fifth. And, further answering said libel and all of the articles therein contained, these defendants allege that upon and prior to the month of November, 1879, one C. S. Weaver and R. S. Munger were then and there copartners, engaged in and doing business at Bismarck, in the Territory of Dakota, under the firm name of "C. S. Weaver and Co.," and were engaged in operating certain ways or docks located upon the banks of the Missouri river; that on the 17th day of November, 1879, the season of navigation on said river having then closed, these defendants, as the owners of the said
34 steamer "Butte," entered into a certain contract and agreement with said C. S. Weaver & Co. (a copy of which is hereunto annexed and marked "Exhibit A"); that under and pursuant to the terms of said contract these defendants delivered to the said C. S. Weaver & Co. the said steamer "Butte," which said steamer was then and there out of commission and not engaged in the navigation of said river, and thereupon said "C. S. Weaver & Co." took exclusive charge and control of said steamer, which was not then occupied by or in the care or custody of the master or crew or any of the employees of these defendants; that pursuant to the terms of said contract the said C. S. Weaver & Co. hauled said steamer "Butte" out of said Missouri river and upon said ways located upon the banks thereof, and then and there propped her up and stayed her on shore, where she remained in the sole and exclusive care, charge, and custody of said Weaver & Co. under the provisions of said contract.

That at the same time the said C. S. Weaver & Co. had also made with said libellants a contract similar to Exhibit A for the hauling out upon said ways and keeping thereon of the said steamer "McLeod," and that said "Colonel McLeod" had been surren-
35 dered to and was then and there in the sole and exclusive care and custody of the said C. S. Weaver & Co.

That on said 17th day of November the said libellants and the said C. S. Weaver & Co. carelessly, negligently, and unnecessarily, and after the said "Butte" had been by the said C. S. Weaver & Co. propped up on said ways on shore, dropped the said Colonel McLeod down to or hauled her up in front of the said ways, and then and there unsuccessfully, negligently, unskillfully, and carelessly moored her in the said Missouri river immediately at the foot of said ways, and left her there without a crew, master, guard, or watchman of any description; that during the night of said 17th day of November, for some cause which is unknown to the defendants, the props and stays holding said steamer Butte upon said ways gave way, whereupon she slid down said ways into and upon said "Colonel McLeod," and that said collision, then and there produced in manner and form as aforesaid, was the only collision that took place between said vessels, and is the same collision and cause charged in the complaint and in the said libel.

Sixth. And said defendants allege that at the time of the collision aforesaid neither of said vessels were engaged in navi-
36 gating the Missouri river, nor was there upon either of them a master, crew, or other person or persons in charge of them or either of them; that these defendants had long theretofore surrendered the entire care, custody, and control of said steamer "Butte" to the said C. S. Weaver & Co.; that neither these defendants nor any one for them had propped or stayed or superintended the propping of said steamer "Butte" upon said ways or the placing of her upon the same, or had supervised the same or any part thereof, nor had they any control or right of interference with said steamer "Butte" in any manner or to any extent, and as to whether said props gave way by reason of being unskillfully placed or by reason of any negligent act in connection therewith done or committed by said C. S. Weaver & Co., or as to whether the same occurred by reason of a violent storm, inevitable accident, or act of God, these defendants have no knowledge nor can they state.

Seventh. And these defendants further allege that the mooring by said libellants or by said Weaver & Co. of the said "Colonel McLeod," in front of and against said lower portion of said ways
37 and permitting her to remain there during the night time without protection, motive power, or crew, or guard was a negligent, careless, and unskillfull and unnecessary act upon the part of said libellants and said Weaver & Co.; that the same was not a proper or safe place to moor said "Colonel McLeod;" that said steamer had no right *in* business in front of said ways, except for the purpose of being hauled thereon; that said libellants and said Weaver & Co. did not intend to haul said "Colonel McLeod" out upon said ways until the 18th day of November, 1879, and that both — and above said ways and in the immediate vicinity thereof there was upon the banks of said river proper safe and adequate mooring places for said boat, from which she could have been dropped down or hauled up to the said ways at and when said libellants and Weaver & Co. desired to haul her out upon the same, and that if said "Colonel McLeod" had been so lying at her proper berth no injury would have occurred to her through any slipping or falling of the said "Butte" back into the river.

Eighth. And, save as hereinbefore stated, admitted, or denied, these defendants deny each and every allegation, matter, and
38 thing in said libel and all of the articles thereof therein contained.

Ninth. That all and singular the premises are true.

Tenth. And said defendants pray that said libellants may be by this court required, within a time to be fixed by the court, to answer under their solemn oaths the interrogatories hereto annexed, marked "Exhibit B," pertaining to the charges and matters claimed for in said libel.

Wherefore said defendants pray judgment of this honorable court that they may be hence dismissed and with their costs.

O'BRIEN & WILSON,
Proctors for Def'ts, St. Paul, Minn.

"EXHIBIT A."

This agreement, made and entered into this 17th day of November, 1879, by and between C. S. Weaver & Co., party of the first part, and the steamer Butte and owners, party of the second part, witnesseth:

The party of the first part, for and in consideration of the sums of money to be paid and the covenants and agreements to be performed by the party of the second part, agree to furnish the use of and room on the Bismarck marine ways, at Bismarck, D. T., for the
39 steamboat Butte during the winter of 1879 and until the river is free from ice in the spring of 1880, for which the second party agrees to pay two hundred dollars ($200) as soon as said boat shall be hauled out of the river and placed on said ways.

The parties of the first part further agree to haul the steamboat Butte out of the Missouri river onto said ways, said boat having first been placed in proper position in front of said ways by the second party, for the sum of one hundred and twenty-five dollars ($125), to be paid as soon as said boat is on said ways.

The party of the first part agrees to block up the steamboat Butte to a convenient height to admit of caulking after she is on said ways for the sum of one hundred and fifty dollars ($150), to be paid as soon as said boat is so blocked up.

The party of the first part agrees to let the steamboat Butte down onto said ways for the sum of seventy-five dollars ($75.00), to be paid as soon as said boat is so let down.

The party of the first part further agrees to put the steamboat Butte into the Missouri river in the spring of 1880, when said river is free of ice, for the sum of fifty dollars ($50), said amount to be paid as soon as boat is in the river.

And it is mutually agreed and understood between the par-
40 ties hereto that the parties of the first part shall not be liable while handling the boat as above stated for any damages whatever to same unless said damages be caused by gross carelessness on their part.

And it is further agreed and understood that the parties of the first part do not assume any risk and are not liable for any damage to or destruction of said boat from any cause whatever, except as heretofore stated, while said boat remains on said ways.

And it is further mutually agreed and understood that said boat shall not remain on said ways to the damage of any boat or boats that may be above her after the opening of the river in the spring of 1880, but that the party of the first part may then place said boat in the river, first giving three days' notice to the persons in charge on board.

And it is further mutually agreed that as soon as said boat is afloat in the spring of 1880 all agreements to be performed by the first party shall be completed, and they shall be entitled to payment in full in accordance with the terms of this agreement.

In witness whereof we have hereunto set our hands and seals this 17th day of Nov., A. D. 1879.

C. S. WEAVER & CO. [SEAL.]
41 A. M. JOHNSON. [SEAL.]

"EXHIBIT B."

Interrogatories to be propounded to the libellants in the within case.

Interrogatory first. Did you not contract and agree with C. S. Weaver & Co. to haul out upon their ways at Bismarck the steamer "Colonel McLeod," and to keep her there upon said ways until the following spring? If said contract was in writing we require that you annex to this answer a true copy of said contract.

Interrogatory second. Had not said steamer "Colonel McLeod" been surrendered by you to the care of said Weaver & Co. and into their possession and control to be hauled out upon said ways at the time of the occurrence of the collision for which you claim?

Interrogatory third. Had not said "Colonel McLeod" at that time been dismantled, her fires put out, her motive power inoperative, and had not her master and crew left her?

Interrogatory fourth. Had not said "Colonel McLeod" been moored at the foot of and immediately in front of said ways, and left there from the time of said mooring until the occurrence
42 of the collision for which you claim?

Interrogatory fifth. Could she not have been readily moored above or below said ways until said Weaver & Co. were ready to haul her out, and in such case would she not have remained unimpaired, even if said "Butte" had slipped down said ways in the river?

O'BRIEN & WILSON,
Proctors for Def'ts, St. Paul, Minn.

[Endorsed:] United States district court, district of Minnesota. In admiralty. Isaac G. Baker *et al. vs.* T. C. Power *et al.* Answer. Filed Aug. 1st, 1881. Wm. A. Spencer, cl'k, by I. N. Cardozo, dep'y. O'Brien & Wilson, proctors for def'ts, St. Paul, Minn.

43 United States District Court, District of Minnesota. In Admiralty.

(Title of cause.)

Interrogatories to be propounded to libellants in the within case.

Interrogatory 1st. Did you not contract and agree with C. S. Weaver & Co. to haul out upon their ways at Bismarck the steamer "Col. McLeod," and to keep her there upon said ways until the following spring? If said contract was in writing we require that you annex to this answer a true copy of said contract.

Answer to 1st interrogatory. There was a verbal agreement with C. S. Weaver & Co. to haul the steamer Col. McLeod out on the ways. I do not know of any written contract.

Depositions of witnesses produced, sworn, and examined on the 11th day of January, A. D. 1882, between the hours of ten a. m. and six p. m. of that day, at the city of St. Louis, in the State of Missouri, before me, Paul F. Coste, a notary public within and for the said city and State, pursuant to a stipulation in writing hereto attached, in a certain cause now depending in the district court of the United States for the district of Minnesota, in admiralty, wherein Isaac G. Baker *et al.* are libellants and Thomas C. Power *et al.* are respondents, on the part of the libellants.

Present: J. H. Davidson, Esq., of Williams & Davidson, proctors for libellants, and N. A. Wilson, Esq., of O'Brien & Wilson, proctors for respondents.

By consent of the attorneys aforesaid the depositions were taken at the office of Paul J. Coste, notary public, No. 521 Olive St., St. Louis, Mo.

PAUL F. COSTE,
Notary Public.

48 SILAS ADKINS, of lawful age, being produced, sworn, and examined on the part of the plaintiffs, deposeth and saith:

Direct examination by Mr. DAVIDSON:

Q. Please state your name, age, residence, and occupation.

A. Silas Adkins; age, 53; residence, St. Louis, Mo., and by occupation inspector of the marine board of underwriters; a ship carpenter by profession.

Q. How long have you been inspector of the board of underwriters at St. Louis?

A. Five years.

Q. What experience have you had in building or in superintending the building or construction of steamboats in the Mississippi river and its tributaries?

A. About 30 years' experience.

Q. During that time about how many steamboats of all classes, to the best of your recollection, have you superintended the construction of?

A. I suppose hundreds; I have no figures, though.

Q. In what shops or marine ways have you been employed during that thirty years?

A. At Cincinnati and St. Louis.

Q. What are your duties in connection with the board of underwriters of the city of St. Louis as inspector?

A. I have to inspect steamboats and make a report to the board of their condition—whether insurable or not.

Q. In making such reports what is the character of your examination you give to each separate vessel?

A. I see if she is tight, sound, and seaworthy.

49 Q. You take a measurement of the length and depth of the hold?

A. Yes, sir; that is the first thing that I do when I see a steamer—take a survey of it—and afterwards I make inspection as often as I think necessary or as often as I see the boat.

Q. Is this matter of survey made a record of in your office and your reports to the board of underwriters?

A. Yes, sir; in all cases.

Q. Are you familiar with the various steamboats running on the Upper Missouri river?

A. Yes, sir.

Q. Have you any duties to perform for the board of underwriters in connection with the various vessels employed on the Upper Missouri river?

A. Yes, sir; I have been in the habit of going up there every spring to inspect them, except this winter. I was sick and could not go.

Q. That is, in 1881?

A. Yes, sir.

Q. Did you ever know the steamer Col. McLeod?

A. Yes, sir.

Q. When and where was she built?

A. In Cincinnati in 1878.

Q. Do you know who planned her or drew the specifications for her construction?

A. I made the specifications and superintended the construction of her.

Q. About what time was she built in 1878?

A. I don't remember just the month.

Q. Was it in the early spring or in the middle of the year?

A. In the early spring.

Q. Give her dimensions.

WITNESS: Can I look at my memoranda?

50 Mr. DAVIDSON: Yes, sir.

WITNESS: I will correct myself first; she came here in July, 1878.

Q. That was on her first trip when this measurement was taken?

A. Yes, sir (witness refers to memorandum); she is 175 feet long, 26-foot beam, and 3 and ½ feet deep.

WITNESS: Do you want the other dimensions?

Mr. DAVIDSON: Yes, sir.

A. She had two boilers 22 feet long and 42 inches in diameter; she had a steel shaft and an iron wheel, and was well outfitted.

(Witness here produces a paper, which is marked Exhibit "A" and hereto attached.)

Q. Was she built for any special trade?

A. She was built for the Upper Missouri trade.

Q. Expressly as an Upper Missouri river boat?

A. Yes, sir; for an Upper Missouri river boat; especially for the trade between Bismarck and Fort Benton.

Q. Was this outfit of engines and boilers new?

A. Yes, sir; all new. The whole boat was new.

Q. How did she compare with other boats for size and capacity built for the Upper Missouri river?

A. I think she was the best boat up there for the purpose for which she was designed—that is, for a light-water boat.

Q. Did you inspect her when she came here to the port of St. Louis for the board of underwriters?

A. Yes, sir.

Q. How was she classed for insurance?

51 Objected to by defendants' counsel. Question withdrawn.

Q. Did you see her any more after she left St. Louis to go to the Upper Missouri?

A. I saw her at Bismarck.

Q. When?

A. In the spring of 1879.

Q. Did you examine her to ascertain her condition?

A. I made an inspection to find out what her condition was.

Q. What other Upper Missouri river boats did you examine in 1879 or 1878?

A. I don't remember what ones, but several others.

Q. What was her condition in the spring of 1879 when you examined her?

Objected to by defendants' counsel as incompetent and immaterial.

A. She was in good condition and I reported her to that effect.

Q. Is it any part of your duty as inspector for the board of underwriters to fix the valuation on those boats you inspect for the board?

A. Yes, sir; I value all the steamboats I inspect.

Q. What valuation did you place on the Col. McLeod at the time of your inspection of her in the spring of 1879?

Objected to by defendants' counsel as incompetent and irrelevant.

A. I placed the valuation of $13,000 on her.

Q. Was that, in your judgment, a fair cash valuation of her at that time?

Objected to by defendants' counsel as incompetent and irrelevant.

52 A. Yes, sir.

Q. Did you see her any time after that?

A. I think not.

Q. Did you know the condition of the bank up there at Bismarck where some marine ways were constructed?

A. Yes, sir.

Q. Did you see those ways in the spring of 1880?

A. I do not remember. I remember seeing them, but I cannot tell just what year it was that I saw them.

Q. You did see them?

A. Yes, sir; I was down there to them.

Q. What was the general character of the soil in which they were constructed?

A. Just like the Missouri soil; generally sandy soil—just like the banks of the Missouri all around there.

Q. Can you state what sort of ways those were?

A. They were just logs laid down on the bank.

Q. With oak sticks on top of them?

A. With oak sticks on top of them and the grabs that they worked cattle, horses, or mules on.

Q. Not the most modern appliances for handling vessels?

A. No, sir.

Q. They had no such things as cradles to take vessels out on there?

A. No, sir; she rested on her own bottom on the skids.

Q. About what would you say was the slope per foot of those ways as you saw them?

A. I think 1 and ½ or one and ¾ inches.

Q. Was that about the ordinary slope for ways of that character for hauling out vessels?

A. The slope is always regulated by the bank you are on.

53 There are ways with more and some with less slope. The ways at St. Louis are two inches to the foot, and in Cincinnati two and one-quarter inches to the foot.

Q. Did you ever see the steamer Butte?

A. Yes, sir.

Q. Did you inspect her here?

A. Yes, sir.

Q. Did you measure her?

A. Yes, sir.

Q. Was she larger or smaller than the Col. McLeod?

A. She was a larger-class boat.

Q. If the steamer Butte had been hauled out upon those ways as you saw them would it have been necessary to secure her so as to prevent any danger of her sliding or slipping back into the water?

A. If the pulley apparatus had been attached it would have been necessary to handle her with hatchicks—that is, little blocks of wood with spikes through them. That is a matter that we are always very careful of in this country.

Q. Could she have been made any more secure by blocking her up so as to leave her weight entirely or partly on the ways, leaving it rest on grab blocking?

Objected to by defendants' counsel as incompetent, irrelevant, and immaterial.

A. She would have been perfectly safe there.

Q. Was the character of the soil such that by placing shores in under her knuckle, with the lower end simply resting on the land or set into the ground, would actually render it secure and safe?

A. That would depend entirely upon the number of the shores. We never trust shores here.

54 Q. With your experience with marine ways, would you regard it as a safe or an unsafe thing to do to leave such a vessel resting on shores simply?

A. We never think it safe here, therefore do not do it, and we have a solid ground here to work on. In addition to a great many shores substantially set, we block the boat up besides.

Q. Would a boat of the size and weight of the Butte, resting on those shores after being hauled out, be materially affected by any ordinary wind blowing in shores across the Missouri river at that point, as to safety?

A. If it was blowing off shore it would have a tendency, of course, to drive the boat down towards the water.

Q. I say if it was blowing in shore?

A. Would then have the contrary effect, of course; blowing across the river—on the river side of the boat—it would have the contrary effect.

Q. Do you know the firm of C. S. Weaver & Co., at Bismarck?

A. I never did, except by reputation.

Q. Did you know Mr. C. S. Weaver?

A. No, sir.

Q. Did you know anything of his reputation as a man skilled in handling vessels on ways and taking care of them?

Objected to by defendants' counsel as irrelevant and incompetent.

A. Nothing, except by hearsay.

55 Q. From what you have heard from parties who have had business with him in connection with the ways at Bismarck, would you consider him or have you heard him spoken of as skillful or unskillful in the business?

Objected to by defendants' counsel as irrelevant and immaterial.

A. His reputation is of a man not skilled in the business.

Q. Do you know whether there was any appliances at Bismarck or on the Upper Missouri river, such as marine pumps, barges, blocks, tackle, and the necessary outfit for raising a sunken boat?

A. There was none there to my knowledge.

Q. Were you up there in the fall or winter of 1879?

A. I think not; I was up there this fall.

Q. As a matter of fact, it was an out-of-the-way place to handle a sunken vessel, in the way of getting the necessary outfit to take care of a vessel that meets with misfortune, is it not?

A. Yes, sir.

Q. At the close of any season of navigation on the Upper Missouri river, what is the condition generally of these boats plying up there as to being more or less injured in the hull by having holes knocked in them and calamities that they might meet in navigation?

Objected to by defendants' counsel as irrelevant, incompetent, and immaterial.

A. The service is very hard on the upper river, and a vessel after having gone through one season, especially in low water, generally needs repairs. I found it so this fall.

56 Cross-examination by Mr. WILSON:

Q. Were those ways such as a vessel could be hauled out safely on them?

A. With skill and a knowledge of the business I do not think there is any trouble about it. I have seen it done a great many times.

Q. One was constructed similarly to these?

A. Yes, sir: I have seen such ways at Pero, Grand Tower, Grafton, and at Yankton and Sioux City. I have seen boats pulled out on all of them. They are what we call portable ways in the sense used in that country on account of the soil being so treacherous that they are built on.

Q. There is more or less danger of the boats sliding from these ways, is there not?

A. There is always danger if skill is not used in the handling of them.

Q. In your judgment, would it be safe to allow one boat to remain at the foot of the ways while another was being hauled out on the ways?

A. I think there is no danger whatever if skill is used in the management—in the hauling out. We do it here often.

Q. You use tackles here, do you not?

A. Yes, sir.

Q. Do you regard it as absolutely safe to allow one boat at the foot of the ways while another is being hauled out?

57 A. I would have no hesitancy in doing it, for the reason that I would make my boat safe that I was pulling out.

Q. You speak particularly of St. Louis, do you not?

A. Any place the same rules will apply.

Q. When have you heard Mr. Weaver's reputation as a man not skilled in this business spoken of?

A. I could not tell you. I have heard it from carpenters with whom I have come in contact—I could not tell you where—that he was a man that would go ahead with what he undertook to do, but that he was no mechanic of any kind, or at least not a ship carpenter, and that he had no experience in this business.

Q. Was it before or since November, 1879?

A. It has been since that year. I had never heard of him before.

Q. Can a boat be raised in winter as well as in summer?

A. The ice might bother you in winter; you might be injured by excessively cold weather. I should prefer to raise a boat in warm weather to cold weather.

Q. It can be done in winter?

A. It has been done.

Q. You would require different appliances in winter from those you would need in summer?

A. Not necessarily.

Q. You would not use barges in the winter, would you?

A. If the ice was strong enough to bear the weight of the boat

winter time would be the best time to do it, for you would have a foundation to work on—the ice itself.

58 Q. And the appliances that are ordinarily used in the summer time would not be required in the winter time?

A. Not if the ice would bear it; otherwise the ice would be a detriment, in so far as it would have to be taken away to get room for such barge.

Q. Boats are ordinarily worth much less after a season's use in the Upper Missouri river than they are before?

A. That is owing to how they have been handled during the season. One boat might be very much broken up and injured and another might not. We sometimes find boats in the fall of the year in almost as good order as they were in the spring.

Q. Steamboats in that vicinity are much less valuable after the close of the season than at the opening, are they not?

A. A steamboat is worth more up there than here—the same boat. She is worth from two to three thousand dollars more up there than here.

Q. She is worth less up there in the fall than she is the beginning of the season, is she not?

A. Only to the extent of the cost of repairing her, if she needed repair, and for putting her in the ways and taking care of her?

Redirect examination by Mr. DAVIDSON:

Q. Without knowing the condition of the steamboat Col. McLeod at the close of the season of navigation of 1879, you could not say what would be the difference in her value at that time from

59 what it was when you inspected here in the spring?

A. Not without knowing how much she had been injured and worn.

Q. Then if she was not very materially injured, except the ordinary wear and tear of the season's business, the difference in value would be about what it would cost to put her in thorough repair to take care of her in the winter, would it not?

A. Yes, sir.

Q. The use of ways on the Upper Missouri river is to haul the boats out and to free them from any danger from ice?

A. Yes, sir; we haul them out if they do not need any repairs, as a matter of safety.

Q. To keep them out of danger from the ice?

A. Yes, sir.

Q. In the matter of handling a boat upon sliding ways as well as on ways where cradles are used, it requires in both cases skill and experience in the business?

A. Yes, sir.

Q. Those hutchicks you speak of are fixed as scantling or timber and spiked onto the ways?

A. Yes, sir.

Q. She could not override those hutchicks without tearing out the planks and washing them all off?

A. No, sir.

Q. The boat having been drawn out on these ways, after being greased as they ordinarily are in order to make them slide smoothly, would you regard it prudent or imprudent, safe or unsafe, to allow it to stand over night simply by having shores placed under
60 her knuckle?

A. I should have done it myself—stopped her wherever night came on me.

Q. And there left her resting on the shores?

A. Yes, sir; I would leave her resting on shores, hutchicks, too, and all the means necessary, as I thought, to make the boat perfectly safe. I would never have left her until I was satisfied she was perfectly safe.

Recross-examination by Mr. WILSON:

Q. She could be made perfectly safe by shoring?

A. I think so; if the bank was of a proper kind of soil or not too near the edge so as to shove the bank off. It could be made perfectly safe, but it would require skill in the setting of those shores.

EXHIBIT "A."

Steamboat Col. McLeod, examined April 10, 1879.

Sound, tight, and in good order for Missouri river and tributaries above Yankton.

Value, $13,000.00.

SILAS ADKINS, *Inspector.*

Steamboat Col. McLeod, class C, No. 2.

Examined July 12th, 1878. Stern-wheel; was built in Cincinnati in 1878. Measurement of tonnage, 171 and $\frac{67}{100}$ tons. Carries 225 tons.

Description of boat.

Length on deck, 175 feet; breadth, 26 feet; depth, 3 and one-half feet; draws light 13 inches; floor, 25 feet; bottom plank, 3 and 2 and ½ inches; side planks, 3, 2 and ½, and 2 inches.
61 Set in hold; original cost, $13,000.00; value at Bismarck, 1879, $13,000.00.

Description of engines.

2 boilers, 22 feet length, 42 inches diam., flues; cylind., 4 and ½ feet stroke, 12 inches diam.; iron water-wheel, 13 and ½ feet; length of buckets, 17 and $\frac{3}{12}$ feet; doctor, one; 2 deck and one donkey; machinery, new; by Dennont.

Names and residences of owners, I. G. Baker & Co.; name of captain, John Massie.

Description of hull.

Bow timbers, 3½ and five at K; at top, spaces 4 and 3 and ½ inches; floor timbers, all 3 and ½ and 5, in spaces 9, 10, and 11 inches; side timbers, 2 and ½ and 5 in. at knuckle; at top, 2 and ½

and 3 and ½ in.; futtocks flitch, 2½ inc. thick; cocked hats, 2½ and 2 inches; main kelson, 4 and ½ and 12 inches; 2 bulkheads athwartship; knuckle kelson, 3 x 8 in. aft, 6 x 8 inches for'd; 3 bolts; stanchion streaks, none; is open hold; stringers over head of stanchions, none; floor streaks, 4 each side, 4 x 5, full-bolted; deck clamps, two pieces 2½ x 7 and 2 x 5, bolted; side clamps, one each side, 2 x 6 in., 1 bolted; pointer, one each side, 2 x 6, 1 bolted; breast hooks, two good, and one deck; deck beams, 4 x 2½; how fastened, full and well.

General remarks.

A well-built stern-wheel boat; has good power and outfit; is good for Missouri river and tributaries above Yankton.

SILAS ADKINS, *Inspector.*

62 Stern-wheel boat Butte, class B, No. 2.

Examined May 5th, 1879; was built at Pittsburgh, 1879; length on deck, 190 feet; cost to build, $19,000; breadth of beam, 34 feet; breadth of floor, 33 feet; depth of hold, 4 feet; thickness of bottom plank, 3 and ½ inches for 125 feet; balance, 3 in.; thickness of side plank knuckle, 4 in., 3 and ½, and 3 in.; balance, 2 and ½ in.; size of floor timbers, 3 and ½ and 3 x 5 in.; spaces, 10, 11, and 12 in.; size of top timbers for'd, 3 and ½ x 5 and ½ at K., 3 and ½ at top; balance, 3 and 2 and ½ x 5 and ½; size of main keelson, in two pieces, 4 x 6 inches each; size knuckle keelson, 3 and ½ by 10, for'd; aft, 3 x 10, 3 bolts; deck clamps, two pieces, 2 x 8 and 2 x 8 inches; side clamps, two pieces, 2 and ½ by 6 and 2 and ½ by 6 inches; floor streaks, four, 2 and ½ by 7, and one under posts, 8 x 14 in.; thickness of futtocks, 3 x 2½ inch.; beams, 2 and ½ and 3 x 5 inches, oak and poplar; breast hooks, two good, one kneed; how fastened, well; cylinders, two; length of stroke, five feet; diameter, 13 and ½ inches; boilers, 2, steel, 42 in.; diameter, 26 feet long; wheel, one; length of bucket, 25 and $\frac{9}{12}$ feet; diam., 15 and $\frac{3}{12}$ feet; owners, McGarry and others; master, James McGarry; outfit, complete.

Remarks.

Is a well built stern-wheel boat; is good for Missouri river and tributaries above Yankton.

SILAS ADKINS, *Inspector.*

63 CHAS. D. BAGLEY, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposeth and saith:

Direct examination by Mr. DAVIDSON:

Q. Please state your name, age, residence, and occupation.

A. Chas. D. Bagley; age, 48; residence, St. Charles, Mo.; occupation, carpenter.

Q. Have you been employed on steamboats as ship carpenter?

A. Yes, sir; for twenty years.

Q. Have you had any experience in building and repairing boats and in hauling boats out upon the ways?

A. Considerable; yes, sir.

Q. Have you run upon boats more or less as ship carpenter—in that position?

A. Yes, sir; always.

Q. Have you assisted in the construction of any marine ways at any point; and, if so, where?

A. Yes, sir; at Sioux City and Yankton.

Q. Have you had experience in hauling out vessels for repairs at Sioux City, Yankton, or Bismarck?

A. Yes, sir; at all of those places.

Q. How were you employed during the season of navigation in 1879?

A. As watchman and carpenter on the steamer Col. McLeod—that is, for the latter part of the season.

Q. About what time in the season of 1879 did you commence such employment on the steamer Colonel McLeod?

A. I think it was the fore part of August.

64 Q. Where was she then employed?

A. She was running from Bismarck to Ft. Benton.

Q. About when did she make her last trip for that season; about when did her trip end?

A. The trip ended, if my memory serves me right, about the 9th, or her arrival at Bismarck.

Q. Ninth of what?

A. Of November; near the 9th of November.

Q. She was laid up there, was she?

A. Yes, sir; she was then laid up.

Q. Did you see the marine ways at Bismarck, where she was laid up?

A. Yes, sir.

Q. How close was she laid up to the foot of the ways?

A. I think three lengths of the boat.

Q. Above the ways?

A. Yes, sir.

Q. Who of the crew remained on the boat after she was laid up until about the time of the accident, or who remained there with her in charge of her?

A. The captain.

Q. Name him.

A. Mr. Murphy was in charge of her, and I saw the head clerk in her and Mr. McClenden.

Q. Was the clerk still there?

A. No, sir.

Q. He was there awhile after she was laid up, was he?

A. Yes, sir; but I cannot say how long; I think he must have left Bismarck the day before or, perhaps, the same day of the accident.

Q. He stayed there and paid the crew off?

A. Yes, sir; and did what we term "laying up the boat," and did all the business that a clerk would do.

65 Q. What was his name?

A. Edwards.

Q. You were acting as ship carpenter and watchman?

A. Yes, sir.

Q. Did you make an examination of her about that time and daily until the time of the accident to see what condition she was in as to leaks?

A. Yes, sir; I was constantly looking after her.

Q. You may state what condition her hull was in.

A. She had broken something like 70 timbers, none of them so badly but that they could be shored down. We shored them down and made them all safe. Besides that she had some holes through her bottom planks—one or two small holes, such as we stopped by battening down.

Q. Go on and state what is meant by bulkheads.

A. These were battened down and bulkheads built around them. What we term a bulkhead is planks set up and fastened and caulked in such a manner as to confine the water to one place, as near as possible, to keep it from spreading.

Q. This bulkhead was about what dimensions, squared, if that form?

A. It was somewhere near ten feet square—perhaps 8 or 9 feet or 10—something like that.

Q. How long before the time she was laid up did this injury to her hull around which you built a bulkhead when the timbers were broken happen?

A. It must have been six weeks. We got here to Bismarck and I built the bulkhead there, and we made the Cow Island trip and returned north, up to Ft. Benton, with that bulkhead in her.

66 Q. What is that distance in miles, about, from Bismarck to Cow Island?

A. 900 miles, if I recollect?

Q. Then the round trip you made after the bulkhead was put in was about 1,800 miles, was it?

A. Yes, sir.

Q. Was there anything as to her condition that caused any immediate danger of sinking?

A. No, sir; not then.

Q. Was she in such condition that she needed a repairing?

A. Yes, sir.

Q. About what would have been the cost at Bismarck after she was hauled out upon the ways and blocked up in proper condition to do so to have replaced the worn-out plank in the bottom and to have thoroughly repaired all the broken timbers and to have put her hull in complete condition for navigation the ensuing season?

Objected to by defendants' counsel on the grounds that the witness has not shown himself competent to give any opinion upon that point.

Question withdrawn for the present.

Q. Do you know about the cost of such materials at Bismarck requisite to making the repairs on the Col. McLeod?

A. I know about what they would cost per foot—such lumber.

Q. Who was to have charge of the repairs to her during the winter, putting her in shape?

A. That is a thing that I did not hear discussed.

Q. You, as her ship carpenter, was to remain there with her?

67 A. Yes, sir; but the matter of repairs had not been determined upon then.

Q. You know about the cost of such timbers and materials at that time as were necessary to make those repairs?

A. Yes, sir; I know about the cost per foot.

Q. And the quantity and the amount of labor it would take?

A. Yes, sir; I could ascertain the exact quantity in a short time.

Q. State, in your judgment, what it would have cost to have thoroughly repaired her hull and put her in good condition for the ensuing season's business? I do not mean including the expense of hauling her out on the ways and blocking her up and taking care of her during the winter, but simply the expense of the repairs themselves.

Objected to by defendants' counsel on the grounds that the witness has not shown himself competent to testify as an expert, and as incompetent, irrelevant, and immaterial.

A. Not to exceed a thousand dollars.

Q. Have you run on other boats on the Upper Missouri river than that?

A. Yes, sir.

Q. Are such injuries as you have described to the hull of the Col. McLeod usual or unusual at the end of the season's navigation?

Objected to by defendant's counsel as incompetent, irrelevant, and immaterial.

68 A. Usual; it is an every-season occurrence; it is every boat's experience, to a greater or less extent, in that trade.

Q. Now, will you describe, as nearly as you can, what their ways were that the boat was to be hauled out upon?

A. These ways were a set of timbers about 12 inches square set on blocks at a distance of 16 or 18 feet apart.

Q. And extending back about how far from the water's edge?

A. About 200 feet from the water's edge.

Q. Sloping up from the river?

A. Yes, sir.

Q. Was there anything on the top of these square timbers?

A. There was an oak plank placed on top of them.

Q. Dressed off smooth?

A. Yes, sir.

Q. At the time of the accident what boats, if any, had been hauled out on these ways?

A. The Eclipse, Batchelder, and Butte.

Q. What was the tackle or apparatus used in hauling these boats out?

A. There were various lines used on these boats.

Q. The power was mule or horse power?

A. Yes, sir.

Q. How did they make the tackling fast to these boats to haul them out?

A. They drew it through underneath and brought it up on the outside and fastened it on the inside of the hull or something.

Q. More than one line?

A. Oh, yes, sir; they put them on at intervals of twenty
69 feet apart.

Q. A great many lines were taken around the boat's hull and fastened in that way?

A. Yes, sir.

Q. And then they would slide them right up on these ways?

A. Yes, sir.

Q. Were these ways greased in any way or oiled to make them smooth?

A. It is customary to tallow them.

Q. Do you know whether they were fixed that way at that time or not?

A. I could not swear that they were or were not.

Q. About what time of day did they commence to haul out the Butte?

A. I think they commenced, if I recollect right, one afternoon. I could not speak positively about that, and it was the following day they got her out.

Q. About what time in the day did they conclude work on her, or get her up to the point that she rested when she slipped off the ways—in the forenoon or afternoon?

A. That must have occurred in the neighborhood of noon. I could not say whether in the forenoon or afternoon. I think afternoon, though, that they got her up to the point where they left her.

Q. What was the condition of the weather that day as to being cold or mild?

A. It was a raw cold day.

Q. Was it below the freezing point?

A. Yes, sir; it was freezing.

Q. Was there ice running in the Missouri river?

A. Yes, sir.

70 Q. In large or small quantities?

A. It was making ice quite rapidly; we looked for what we called large quantities in a few hours.

Q. Sort of setting in of winter?

A. Yes, sir.

Q. Was there any one there in charge of the steamer Eclipse?

Objected to by defendants' counsel as incompetent and immaterial.

A. Yes, sir; there were two men there in charge of her.

Q. Did they stay on board of her?

A. I suppose they did.

Q. Was there any one there in charge of the steamer Batchelder?

Objected to by defendants' counsel as incompetent and immaterial.

A. Yes, sir.
Q. Who was in charge of her?
A. Captain Mason.
Q. Who was in charge of the Butte?

Objected to by defendants' counsel as incompetent and immaterial.

A. Mr. Deitz.
Q. Do you mean the man that was staying there as watchman in charge of her?
A. Yes, sir.
Q. Was her master still there—Captain Mason?
A. Yes, sir; he was at Bismarck.
Q. Was he giving any attention to the boat; was he down about the boat?
A. During the time she was being hauled out he was on the boat; when she was moving I saw him on her there.

Defendants' counsel objects to all this testimony on the same grounds as above.

71 Q. How did the steamboat Col. McLeod come to be dropped down from her moorings when she was laid up in front of the ways; who directed it to be done?
A. Mr. Robert Hazen.
Q. Who was he employed by, Mr. Weaver?
A. Yes, sir.
Q. How many men did he bring with him?
A. Some five or six.
Q. And you and who else assisted?
A. There was no one with me.
Q. What time of day was it she was dropped down?
A. I think immediately after dinner; that it was commenced immediately after dinner, but it took several hours.
Q. What did Mr. Hazen say when he came there about getting her down, who sent him, or what was to be done?

Objected to by defendants' counsel as incompetent and immaterial.

A. He said nothing in reference to the matter.
Q. Only to drop her down?
A. Yes, sir.
Q. How was she dropped down?
A. Simply by slacking up the lines.
Q. And letting her float with the current?
A. Yes, sir.
Q. Then how was she fixed relative to the ways when you stopped work that evening?
A. She was placed in position to take hold of to pull her out.

Q. She laid broadside to the end of the ways already to fasten the tackling and draw her up?

A. Yes, sir.

Q. Did any body stay on the boat that night?

72 A. I did, and Mr. McClendon, the pilot.

Q. Where were you when this accident happened?

A. I was in the hold of the McLeod.

Q. What were you doing there?

A. I was looking around, doing my customary duties.

Q. Seeing that the bulkhead was secure and everything all right for the night?

A. Yes, sir.

Q. Where was Mr. McClenden?

A. He had gone to bed.

Q. Now, tell us just what took place that you know of, from your own knowledge, about the sinking; describe it.

A. I felt the shock. It knocked out my lights and knocked me over, and of course I made an effort to get out, and I heard the water rushing in and knew where the break was. I got out as soon as I could, and when I had got out I saw the Butte in what we term on top of us, lying head against us. She had not slid entirely off the ways. We had checked her. Then, in the course of half an hour, perhaps, she was sunk.

Q. The MacLeod?

A. Yes, sir. I knew where the hole was; at least, I judged where the hole was from where the water was running in, and I got Mr. Deitz to help set a spar to try and hold her head up, and then get a line on the other side of her to hold her in from going out too far; got this line out and was about making it fast to the ways, but before I got it made fast she was sunk.

Q. You did not have any time to examine the hold?

A. No, sir.

Q. But from the sound where was this hole that the water

73 was pouring in?

A. Opposite the breast hook, about ten or twelve feet aft of the stern.

Q. On the starboard?

A. Yes, sir.

Q. She was lying with her head upstream?

A. Yes, sir.

Q. On her starboard side, ten or twelve feet from her stern?

A. Yes, sir.

Q. From the rush of water, could you set any idea as to whether the hole was large or small?

A. Yes, sir; from the rush of water, I should say it was large.

Q. How much water had come into her, as to depth, before you got out of the hold?

A. Before I got on deck the water was half way up my boot tops.

Q. How long, in your judgment, was it from the time that the Butte struck her until she was sunk, so that her deck was under water?

A. Not to exceed 30 minutes.

Q. Was there any one else there to render any assistance except you and Mr. Deitz, to get out the spar and lines and take care of her?

A. No, sir.

Q. There was no time to start pumps or anything of that kind, I suppose?

A. Not a bit.

Q. Did you make the line fast to the ways or the shore?

A. I did make it fast, but she had sunk before I got it made fast.

Q. About what depth of water did she sink in—about how much water was over her in the morning, say?

74 A. I took the measurement immediately that night. She was in 11 feet of water.

Q. Over the deck?

A. No, sir; on fore and aft her forecastle.

Q. Do you know whether the bottom was gently or abruptly sloping up?

A. It was what we term a gentle slope; it was not very abrupt.

Q. About what depth was the water inside of her; what was the depth of the water inside of her?

A. Five or six feet.

Q. Do you know whether the bottom at that point was of the usual character of the Missouri river—sandy—or was it a rough bottom, as far as you know?

Objected to by defendants' counsel as incompetent.

A. I judge it to be of the usual character.

Q. What was done with the Butte the next morning?

Objected to by defendants' counsel as immaterial.

A. She was dropped back under the stern of the Col. McLeod.

Q. Who had charge of dropping her back and taking care of her at that time—the next day; who was on her directing the men in moving her?

Objected to by defendants' counsel as incompetent and immaterial.

A. She was moved by Mr. Deitz, the watchman on board, assisted by some laborers.

Q. Was he not mate of the Butte also; been running as mate on her all season?

A. Yes, sir.

Q. Did Captain Johnson come down to her?

75 Objected to by defendants' counsel as incompetent and immaterial.

A. Yes, sir.

Q. Was he there more or less during the day following the disaster?

A. Yes, sir.

Q. Was he directing in any way—counseling with Mr. Dietz about the care of the boats?

Objected to by defendants' counsel as incompetent, irrelevant, and immaterial.

A. Yes, sir.

Q. Did you stay there, after the accident, in charge of the wreck?

A. I stayed there about three days.

Q. You did stay there about three days?

A. Yes, sir; I think about three days.

Q. What appliances were at hand to take care of a sunken vessel at Bismarck at the time, in the way of pumps, tackling, barges, or any necessary outfit for raising a sunken vessel?

A. There was nothing at hand.

Q. Did you make any effort to find apparatus to raise her—make inquiries?

A. Yes, sir; various suggestions were offered.

Q. Was there any marine pumps there that you knew of or could get?

A. No, sir.

Q. Were there any barges there?

A. No, sir.

Q. Was there any outfit, except such as pertains to boats of that character on the Missouri river—blocks, pulleys, ropes, etc.?

76 A. No, sir.

Q. What was the condition of the Col. McLeod as to being dismantled; had she her full outfit when she was dropped into that position ready for running, or was anything removed?

A. Everything was on her yet.

Q. Just as you navigated her the last trip?

A. Yes, sir.

Q. Was her engineer there?

A. No, sir.

Q. What was the condition of the weather that night as to being calm or stormy?

A. I recollect no storm.

Q. Was there any unusual wind that night?

A. No, sir.

Q. Where did you stay after the boat sunk that night?

A. I stayed in the cabin of the boat.

Q. Did you make any examination the next morning to ascertain how the Butte had been secured upon the ways or into the causes of the accident?

Objected to by defendants' counsel as incompetent.

A. I did.

Q. State what you found, as to shores and other things, indicating the manner in which she had been secured or attempted to be secured?

A. I found 2 shores only; 2 sticks of timber which might usually serve as shores.

Q. Tell us what those sticks of timber were, as to length and dimensions, and so on?

77 —. They were between 4 and 6 feet length; not to exceed 6 feet and not less than 4 feet, and they were either 4 x 6 or 6 x 6, square timbers.

Q. Did you look to see if there were any timbers there that had been used for shores?

A. Yes, sir.

Q. You did not find any?

A. No, sir.

Q. What position were they in?

A. They lay there on the sand as if they had been hauled in the sand.

Q. Were they driven into the sand apparently by pressure—the end that rested on the ground?

A. Yes, sir; they were driven into the sand, but they were not driven in so to stay; they seemed to have been thrown out there to one side; cast to one side and tipped over.

Q. Were they heeled or toed at the bottom in any way to hold them from pressing down into the sand by the weight of the boat?

A. No, sir; there was no indication of it.

Q. Had they been properly set, heeled, or toed at the bottom so as to prevent them being driven into the sand?

Objected to by defendants' counsel as calling for the opinion of the witness as to what was proper.

A. They had not, in my judgment.

Q. Did you examine the ways to see if there were any hutchicks nailed onto them at any point to hold the boat from sliding down the way?

A. I did.

Q. What did you find?

78 A. I found no indication that there had been.

Q. If there had been any hutchicks nailed onto the ways would there have been any remains or marks of the spikes?

A. The broken hutchicks would have been lying there. If they had been hutchicked and knocked off the pieces would have been lying there and I would have seen them.

Q. There was nothing of this kind?

A. No, sir.

Q. Where were those two shores that you spoke of relative to the Butte's bow and stern?

A. One was within twenty feet of her bow; the other was that distance from her stern.

Q. Were there any holes or footings in the sand between where these two shores lay indicating that there had been other shores than the two shores that you saw placed against the knuckle of the Butte?

A. I did not see any.

Q. Was the shore that was nearest to her bow close enough to the bow that it could have rested against her stern?

A. No, sir.

Q. Did you see any part of the stern of the boat broken off next morning?

A. No, sir.

Q. You do not know whether there was any of it broken off or not?

A. No, sir.

Q. How much experience have you had in hauling out and securing steamboats on sliding ways of that character?

A. I have had experience 4 or 5 seasons; I don't recollect how many seasons exactly, but four or five times. I have hauled out boats 3 or 4 at a time.

Q. Then you have had experience in hauling out or assisting in hauling out about how many boats on ways of this character?

A. 50, probably.

79 Q. What was the character and nature of the ground under these ways when the Butte was hauled out?

A. It is mostly river-bottom deposit—sand principally.

Q. From your knowledge of the ways, the character of the ground under the ways, and the general situation would you say that she was properly secured or not that night—the Butte?

Objected to by defendants' counsel as incompetent, and on the further ground that the witness has not shown himself competent to testify.

A. She was not properly secured.

Q. What would have been necessary to have made the Butte secure and to have prevented any possibility of her sliding down the ways into the water, in your judgment?

Objected to by defendants' counsel on the same grounds as above.

A. I can tell you what I should have done if it had been my case. I would have set a shore at each end and put at least two hutchicks on the ways temporarily to hold her there over night.

Q. If she had been lifted up on a crib blocking so that her weight rested on the blocking instead of the ways would not that have rendered it perfectly secure?

Objected to by defendants' counsel on the same grounds as above.

A. Yes, sir; if judgment had been exercised in placing the blocking under her.

80 Q. When you speak about shores and placing them properly, will you please state what is the proper way to place a shore to make it secure?

A. Much depends upon the character of the ground in which you place the shore. If the ground is very sandy you will have to take more pains to put something that has a broad surface at the heel of the shore, the shore bearing at right angles to the —. Then the head of the shore must be so set on that it won't slip down, and, if necessary, put some blocking in all around it, so that the heel won't slip either way, and then the head of the shore where we put it

against the boat, if there is the least possibility of its slipping, we put hutchicks at the head of it, immediately over the head always.

Q. Then, in your judgment, it would require a certain amount of skill and experience for a man to set a shore and get the proper bearing and fix them so they would be secure beyond a doubt?

Objected to by defendants' counsel on the ground that it is leading, and that the witness has expressed no such opinion, and that it is incompetent and irrelevant.

A. Most certainly.

Q. In your judgment, from your experience and knowledge in handling vessels of that character upon sliding ways, would a man engaged in a general lumber business and perhaps with some experience in house building as a house carpenter be a competent man to take charge of a vessel, such a boat as the Butte, upon such ways as then were at Bismarck at that time?

81 Objected to by defendants' counsel on the same grounds as above.

A. No, sir; no man would be competent to take charge of it unless he had had some prior experience in that very business.

Q. Did you at — time or since know L. C. Weaver, *and* the firm of L. C. Weaver & Co.?

A. I knew him since.

Q. Did you make his acquaintance at that time—I mean about the time of the accident?

A. I made his acquaintance after the accident. I had no acquaintance with him before. I knew his name and knew him by sight.

Q. Do you know what his reputation was there at Bismarck among river men and business men as to competency and ability in this particular line—the handling of vessels and having charge of ways for the repairing of boats?

Objected to by defendants' counsel as incompetent, irrelevant, and inadmissible, and upon the second ground that the question is indefinite as to point of time.

A. I can make it definite as to the time. I never knew what his reputation was before that, but I did since.

Q. Do I understand that you have ascertained what his reputation was in that particular since the time of accident?

Objected to by defendants' counsel same as above.

A. Yes, sir.

Mr. DAVIDSON: I am asking if he learned it since the time of the accident.

82 Objected to by defendants' counsel as incompetent and irrelevant.

A. Yes, sir.

Q. State what his reputation was as to competency and skill in that particular.

A. That he is not competent and was not regarded as understanding the business.

Q. If there had been any unusual wind storm that night would you have known anything about it?

A. Certainly.

Q. Was there or not?

A. There was not.

Q. How soon after the boat sunk did it form ice—rapidly, or was it forming ice at the time of the accident?

A. Ice was making all the time.

Q. Did the severe weather continue?

A. Yes, sir; it grew colder.

Q. I believe you stated you only stayed there 3 or 4 days afterwards?

A. I only stayed on the boat that length of time.

Q. How long did you remain at Bismarck?

A. All winter.

Q. How long after she sunk did the river close at that point—that is, freeze over?

A. I cannot positively state.

Q. She sunk, according to the pleadings, on the 17th day of November. I only want to get at it approximately.

A. It closed not far from the 20th of November.

Q. About what time did your employment on the boat cease?

A. The second day after the sinking, I believe.

Q. And you remained at Bismarck all winter?

A. Yes, sir.

83 Q. What did you do?

A. I did not do anything for a couple of months.

Q. Were you down at the boat any more?

A. Nearly every day.

Q. Who was in charge of the wreck after that?

A. Captain Paul Murphy.

Q. Were you there when the marine pump came that was sent up from St. Louis?

A. Yes, sir.

Q. How long after the catastrophe did that get there?

A. I could not say. It was something like at least three weeks, I think.

Q. At that season of the year how would such a machine have to go—what route; could you get it up by the Missouri river, or would it have to go by rail?

A. By rail.

Q. Was the method of communication by rail through St. Paul?

A. Yes, sir; through St. Paul.

Q. Do you know whether the Northern Pacific railroad was open continuously that winter, or was it more or less blocked by snow?

A. It was blockaded.

Q. And when the pumps came you made every effort to raise her?

A. Yes, sir.

Q. What was done?

A. A diver went down underneath the boat on the outside and did what he could towards stopping the place where she was broken, and they put the pumps in and bulkheaded her and pumped her.

Q. Did they use steam in connection with the pump?

A. Yes, sir.

Q. Where did they get the steam?

84 A. From the Butte.

Q. She lay close enough to the stern of the sunken boat?

A. Yes, sir; they pulled her up a little.

Q. She was between the ways and the wreck and they raised steam on her and used the pump?

A. Yes, sir.

Q. What effect had it?

A. It had no effect.

Q. How many siphons had they?

A. I cannot recollect now; they had in about 20 hand pumps besides.

Q. Had they more than one siphon?

A. I think they had two, and don't know but three.

Q. Of what diameter?

A. One was four-inch, I know; I think that was the largest.

Q. Then at that effort they had a marine pump sent up from here and some siphons—you think 3—and about twenty hand pumps, and it did not have any perceptible effect?

A. No, sir.

Q. Who was that diver; do you remember?

A. There were two divers; there had been two efforts to raise her. Mr. Nash was the first man.

Q. Do you know what his first name is?

A. Robert.

Q. Do you know where he is?

A. At Cairo, I think.

Q. Do you know who the other diver was?

A. His name was Guyer; I don't know his first name.

Q. Do you know where he is?

A. I do not.

Q. How long after she sank was this first effort made to raise her?

A. Probably a couple of weeks—that is, on the arrival of the diver.

85 Q. What condition did she be in—that is, to lying true or listed?

A. She was listed some.

Q. Had the wreck closed there; was the ice frozen over?

A. Yes, sir.

Q. Was the weather and conditions favorable or unfavorable for raising a sunken vessel?

Objected to by defendants' counsel as calling for the opinion of the witness.

A. Extremely unfavorable.

Q. Was the temperature during all this time, from the time the

boat sunk and during their efforts to raise the boat, below or above the freezing point at Bismarck?

A. Below the freezing point.

Q. How long after was it, or do you know, when the marine pump from La Crosse reached there?

A. I could not perhaps approximate very nearly that time.

Q. Was it in November or December?

A. In December, I think.

Q. Before or after Christmas?

A. After Christmas, I believe. I think it was.

Q. You don't know the date?

A. No, sir; I think it was snow-bound for some time—some days.

Q. Was the road blockaded during part of December?

A. I think so.

Q. Were you there after that pump arrived, when they made the second attempt to raise the boat?

A. Yes, sir.

86 Q. What was done?

A. About the same process as when they first commenced. The diver went down and did what he could to her bottom, and they commenced working this pump.

Q. What apparatus had they for throwing water?

A. They only worked one pump; this pump that I brought with me.

Q. It was the large pump?

A. Yes, sir.

Q. Did they use the syphons at that time?

A. I don't think they did at that time.

Q. What success did they have?

A. They lowered the water some.

Q. In the hold of the vessel do you mean?

A. Yes, sir; inside of the vessel.

Q. Did they have any success in raising her?

A. They had some hopes for a short time, but they could only lower it a little, as the pressure from the outside was too great.

Q. About how thick was the ice then in the Missouri river around the boat and over her deck where they had to get it away?

A. Perhaps 2 and ½ feet, or perhaps 3 feet in some places.

Q. It was very heavy ice?

A. Yes, sir.

Q. What did they save from the wreck?

A. The boilers, chimney, cabin furniture, and rigging.

Q. Did you make any soundings around the hull after she was sunk to find out whether the sand was cutting away or not?

A. Yes, sir. At the time I left her there was no perceptible cutting away of the sand.

87 Q. Did you make any soundings after that—after you had quit the boat and was still around there?

A. No, sir; but I would infer——

Defendants' counsel objected to any inference.

Q. From your knowledge of the situation, the surroundings, and the lack of appliances at hand, state what more could have been done than was done to raise the boat and save her.

A. Nothing could have been done.

Q. After you had left the employment of the boat and was down about there did you see anything of the master of the boat, Captain Johnson?

Objected to by defendants' counsel as incompetent and irrelevant.

A. No, sir.

Q. Who remained in charge of her during the winter while you were down about there—about the boat?

Objected to by defendants' counsel as incompetent and immaterial.

A. Mr. Deitz, who had formerly been the first mate.

Cross-examination by Mr. WILSON:

Q. What was Mr. McClendon's business on that boat during the summer?

A. He was pilot.

Q. Do you know whether he had been paid off and discharged prior to the time of this accident or not?

A. I don't know; I did not see him paid off.

Q. In what capacity was he acting in the boat at the time the accident occurred?

A. In no capacity.

Q. Had he any duties to perform at that time?

88 A. No, sir.

Q. Then he was merely staying on the boat?

A. Yes, sir.

Q. Was he still in the employ of the owners, do you know?

A. He was not, to my knowledge.

Q. State what timbers were in the steamer McLeod that were broken.

A. By the accident?

Q. No, sir; prior to that time you say there were some 70 timbers broken?

A. It was the floor timbers; the bottom timbers that the planks are nailed to—that the bottom planks are nailed to.

Q. There were no knuckle timbers broken where the bend or the knuckle of the boat is?

A. No, sir; there was nothing broken in the knuckle at all.

Q. In what part of the bottom were these timbers broken?

A. The most of them are in the forward part of the boat; are from the midships forward; some of them aft the midships.

Q. Were these 70 timbers all right in a row with each other—all broken in one place in the boat?

A. No, sir; there would be places where three or four would be broken and then there would be some intervening that were not broken.

Q. Within what space were the 70 timbers broken, in feet?

A. The whole 70 timbers were between the bow of the boat; they were between the after end of the forecastle—that is, the for-
89 ward end of the cabin and the forward end of the engines; that embraces all the timbers that were broken.

Q. How far apart were the timbers in this boat?

A. I believe about 13 inches from center to center.

Q. Then these 70 timbers would comprise a little more than 70 feet?

A. Yes, sir.

Q. How far from the stern of the boat was it to where the first timber was broken?

A. Probably 20 or 25 feet; perhaps more; 25 feet, perhaps.

Q. Were these timbers so broken that they would have to be taken out and new timbers put in?

A. Not necessarily.

Q. They would have to be to put her in first-class condition, would they not?

A. There are various ideas about that; some would leave them in and some would take them out. It would lighten the boat to take them out, and leaving them in gives her additional strength.

Q. New timbers would have to be put in by the side of these and these taken out and others put in their place, would they not?

A. It is not essential to the running of the boat, but the owners are sometimes compelled to put new timbers in; the underwriters may demand it; they are supposed to be replaced at every inspection.

Q. You speak as a ship carpenter. You claim to have knowledge of what is proper and right about a boat?

A. Yes, sir; I claim to have an opinion.

Q. As a ship carpenter would you say it was necessary to
90 take these timbers out; were they useless in the condition they were in?

A. It would not be necessary to take them out.

Q. Were they useless in the condition they were in?

A. No, sir.

Q. What service did they render?

A. They hold the planking—timbers can be broken and not make a boat leak any.

Q. Do you claim that a boat with broken timbers in her is as good as she would be with whole timbers in her?

A. No, sir.

Q. Does not the breaking of timbers deteriorate from the boat the cost of putting in new timbers?

A. Yes, sir.

Q. How much would it cost per timber to put in, to replace, these timbers—how much for each timber?

A. The way they are usually repaired, you mean?

Q. To make them as good as they were in the first place?

A. Do you mean to take the old timbers out and put in new timbers?

Q. Yes, sir; make her as good as she would have been if those timbers were not broken?

A. Perhaps it would cost $12 a piece.

Q. Where?

A. At Bismarck.

Q. Can timbers be replaced there as cheap or cheaper than they can in St. Louis?

A. No, sir; I do not think they can.

Q. How much more would it cost to supply timbers there than here, do you think?

A. Well, lumber will be $2 more—2 cents more per foot.

Q. How about labor?

A. Labor is 30 per cent. higher.

Q. Do you think a contract could have been made to sup-
91 ply these timbers at $12 a piece at that time at Bismarck?

A. I judge so. Yes, sir.

Q. You spoke of a bulkhead having been built in this boat. Was that bulkhead around?

A. Around holes through the plank at the bottom.

Q. How large were those holes?

A. Holes that were perhaps the size of your head.

Q. Occasioned how?

A. By rocks.

Q. By the boat striking?

A. Yes, sir; perhaps you would not call them holes. You could not put your head through; but the bottom up plank would be bruised up so that it would necessitate bulkheading around.

Q. It would let the water in?

A. Yes, sir.

Q. It could only be repaired by putting in new plank?

A. That is all.

Q. How many of these holes were there?

A. There was some three or four planks that we bulkheaded, I think.

Q. Were there any other holes in the boat not included in the bulkhead; other planks broken?

A. There were other planks broken in different places, but not serious enough to necessitate bulkheading around. These were battened and shored down.

Q. The injury to those other planks was not so serious as to require new plank put in to make the boat tight?

A. The boat was perfectly tight. In these other places I spoke
about she was perfectly tight, and perhaps would have re-
92 mained that way, but we usually put in new plank when we take the boat in, whether they leak or not.

Q. How many other places were there?

A. Perhaps 5 or 6—maybe more.

Q. Was there not, according to your best recollection?

A. I could not say whether there was or not.

Q. You think as many as 5 or 6?

A. I should judge so; yes, sir.

Q. What sort of plank was this boat planked with?

A. Oak plank, 3 or 3½ inches thick at the forward end of the boat.

Q. How much, in your judgment, would it have cost to have replaced these broken planks in the boat—these included in the bulkhead?

A. The planks themselves?

Q. The planks themselves and the labor of putting them in—caulking and everything?

A. $300 I presume would have covered that.

Q. What is oak plank worth there—oak lumber—or was at that time?

A. $60.00.

Q. Board measure?

A. Yes, sir.

Q. Was there more than one bulkhead in this boat?

A. That is all.

Q. Were there any other injuries that the boat suffered except what you have testified to?

A. No, sir.

Q. When you speak of $12 as being the expense of putting in these timbers, do you refer to the whole timber?

A. Yes, sir; I speak of the whole timber.

Q. You were on the boat, were you, when they made that trip after the bulkhead was put in?

93 A. Yes, sir.

Q. How often did you have to pump the boat out?

A. I don't know; that would be a little difficult to answer, how often; but we pumped her out every time we found water in her.

Q. How often would that occur?

A. Perhaps every 2 or 3 hours we would put a pump on—a steam pump—and run it until the water was all out of her.

Q. How long would you have to run it on those occasions?

A. Sometimes an hour; perhaps more.

Q. Then you would run the pump from a third to one-half of the time?

A. Yes, sir. I presume the pump was running half of the time when the freight was in the boat. I am now speaking of when the freight was in the boat.

Q. How was it when the freight was out of the boat, when she was running?

A. It would not necessitate near so much pumping.

Q. Why not?

A. The boat is not so deep in the water and the pressure is not so great.

Q. How long had you been lying at Bismarck when this accident happened?

A. I believe it was about 48 or 50 hours.

Q. How long had it been since you returned from your last trip to Bismarck before this accident happened?

A. I think it was in the neighborhood of 2 days or 2 and ½ days.

94 Q. What portion of the time that you were lying at Bismarck after your arrival there did you keep the pumps running.

A. We did not keep the steam pumps going after we arrived there; not after we cooled down.

Q. I do not speak particularly of the steam pumps, but any of your pumps; what proportion of the time were they in use?

A. Really I could not say; I did the pumping myself a little of the time.

Q. Did you have the steam pump running any after you came back to Bismarck?

A. No; pumped her down dry and then let the steam go down.

Q. When did you pump her down dry?

A. On the day of our arrival at Bismarck or the day after; we pumped her out the next day.

Q. Did any one else do any pumping except you while you were at Bismarck?

A. No, sir.

Q. About what time in the day or night was it that this accident happened?

A. Between 8 and 9 o'clock in the evening, as well as I remember.

Q. How long after dark was that?

A. That would be about 3 hours.

Q. You were down in the hold at the time of the accident?

A. Yes, sir.

Q. What were you doing down there?

A. I was looking after the holes to see if our bulkhead had sprung a leak.

Q. How much water was there in the bottom at the time?

A. Just what this bulkhead would hold.

95 Q. How much water was there on the outside of the bulkhead in the boat itself?

A. None; I had pumped that all out.

Q. When?

A. That evening.

Q. At what time?

A. Before dark. During the day I had pumped that all out.

Q. You say the bulkhead had not leaked any at all?

A. None of any consequence; it leaked a little.

Q. What hour of the day was it? Fix it as nearly as you can that you pumped that boat out last that day.

WITNESS: What part of the day?

Mr. WILSON: Yes, sir.

A. Well, some time in the afternoon.

Q. What time in the afternoon?

A. I cannot be positive; it was towards night.

Q. She had made no water in the 3 or 4 hours after that, you say?

A. None of any consequence.

Q. If she made any at all, state how much it was.

A. She may have had an inch inside besides what was in the bulkhead.

Q. All over the floor.

A. No, sir; not all over the floor—that is, in the heaviest part of her, I mean; from the aft end of the boilers forward.

Q. Then did she make water at the rate of an inch in 3 hours while she was lying at the bank?

A. That did not include the whole boat, you know.

Q. I speak as we speak of boats generally. You generally sound boats under her well-rooms, don't you, to see how much water
96 she is making where your pump sets; you would sound your pump to see how much water your boat is making?

A. Yes, sir.

Q. She was making at the rate of an inch in 3 hours by her pumps?

A. It is possible she was. I would not say that she was.

Q. How many pumps did you have on board of this boat—pumps that could be worked?

A. We were working but one at that time.

Q. How long would it take to pump an inch of water out of that boat with the apparatus you had there—your hand pumps?

A. Thirty minutes.

Q. How came you to go into the hold; were you apprehensive of water in the hold?

A. It is a watchman's duty whether he thinks there is any water in the hold or not—whether he has reason to think there is any water in the hold or not—it is his duty to go into the hold at night, or in daytime too, for that matter.

Q. This boat, on that last trip to Cow Island, leaked more than boats ordinarily do, did it not?

A. Yes, sir; more than they ordinarily do.

Q. A great deal more than they ordinarily do?

A. Yes, sir.

Q. And it was owing to her bad condition that she was leaking so badly, was it not?

A. Yes, sir.

Q. Then the boat was in a bad condition, was she not?

A. Don't understand me that she was in an extraordinary
97 bad condition. I have been on boats up there that were in a great deal worse condition than she was.

Q. You made for a harbor or a port as soon as you could, did you?

A. I don't know how to answer that question. When our business was done our voyage was completed.

Q. What time in the afternoon was it that Mr. Hazen came for the McLeod?

A. I think it was immediately—afternoon.

Q. That means after dinner, of course?

A. Yes, sir.

Q. How many men did he bring with him?

A. 5 or 6.
Q. Did he take charge of her and drop her down?
A. Yes, sir.
Q. Had you been instructed to let him take charge of her whenever he wanted to?
A. No, sir; I had no such instructions.
Q. What instructions had you in reference to Weaver & Co. taking charge of the boat, if any?
A. None.
Q. How came you to let Mr. Hazen take the boat and drop her down?
A. I thought it was all right and regular—a tacit understanding.
Q. Where was Captain Paul Murphy at this time?
A. During part of the time she was being dropped down he was there.
Q. Then Captain Murphy surrendered the possession of the boat to Mr. Hazen, did he?
A. I suppose so.
98 Q. Captain Murphy was stopping where at that time—on board the boat or up at Bismarck?
A. At Bismarck.
Q. You were staying on board of the boat?
A. Yes, sir.
Q. Were you on the boat when Mr. Hazen came on?
A. Yes, sir.
Q. Did you hear anything that he said when he came on board?
A. I cannot recollect anything that he said.
Q. Mr. Hazen was in the employ of Weaver & Co. at that time?
A. Yes, sir.
Q. He took sole and exclusive charge in dropping her down, did he?
A. Yes, sir.
Q. And attended to making her fast after she was dropped down?
A. Yes, sir.
Q. How long did that take—dropping her down?
A. I think they must have been three hours in dropping her down.
Q. How far from the ways was she lying at the time they came on board to drop her down?
A. About three lengths of the boat.
Q. Above or below the ways?
A. Above.
Q. What was necessary to be done in order to drop her down except to slacken her lines and let the current take her down?
A. The pushing her out was the difficulty, as the ice was setting in against her and getting her out into the stream.
99 Q. Was she perfectly safe while she was lying at the bank?
A. I would not consider it a good place for winter.
Q. Perfectly safe, except for ice?
A. Perfectly safe, as far as anything else was concerned.

Q. And just as safe, as far as ice was concerned, as at the end of the ways, was she not?

A. Yes, sir.

Q. What was the bank below the ways; was it a perfectly safe place there to tie up a boat?

A. It was about the same character as above.

Q. By slacking up her lines she could drop right down; there was nothing to prevent, was there?

A. No, sir.

Q. If her lines would have been slacked the current would have taken her down below the ways, would it not?

A. Yes, sir; if the ice had not set her in against the end of the ways and held her in she would probably have to be shoved out a little, as a boat does when the current sets in towards the bank.

Q. Below the ways there is no ice between the end of the ways and the shore, as far out as the ways extend, is there?

A. They don't extend far enough out to make much protection there.

Q. How far do they extend out into the water?

A. I should judge about 15 feet.

Q. If she had been dropped down to the end of the ways she could have been pulled right inside; there was no ice to prevent it?

A. I don't recollect.

100 Q. How is the shore there—bold or sloping?

A. The shore itself is bold; it is bluffy—a bluffy bank.

Q. What is the bottom of the river?

A. It had a gentle slope at that time.

Q. If she had been dropped down and pulled in below to the bank she would have had water enough to float?

A. Yes, sir.

Q. Was there any one else on board of this boat besides you and Mr. McClendon when this accident happened?

A. No, sir; no one else.

Q. You wore employed by the owners of the boat?

A. Yes, sir.

Q. In what capacity?

A. As watchman.

Q. For the winter?

A. Yes, sir.

Q. You were expected to watch her on the ways?

A. Yes, sir.

Q. Who employed you to watch her?

A. The captain.

Q. Captain Murphy?

A. Yes, sir.

Q. What instructions were given you by Captain Murphy as to your duties as watchman?

A. None; he did not give me any.

Q. What duties did you understand you had to perform as watchman?

A. To care for the property and perform any services that I could in the way of work.

Q. Did you have anything to do with the securing of this boat on the ways after she had been hauled out?

A. No, sir.

Q. Whose business was that?

A. My supposition was that it was Mr. Weaver's business.

Q. Who did you say was in charge of the Batchelder?

101 A. Captain Mason.

Q. What sort of a charge did he have of her, do you know?

A. Nothing more than he was watchman.

Q. Simply watchman on the boat, the same as you were on the McLeod?

A. Yes, sir.

Q. Who did you say was in charge of the Eclipse?

A. I don't know his name; the marshal was in charge of her at that time.

Q. Who did you say was in charge of the Butte?

A. Mr. Deitz.

Q. In what capacity?

A. Watchman.

Q. Nothing more than there to do the duties of a watchman, was he?

A. No, sir.

Q. When did you last see Captain Johnson before the accident?

A. I saw him on the day preceding the night of the accident.

Q. What was he doing?

A. I saw him on the Butte?

Q. What was he doing?

A. I did not see him doing anything.

Q. Where was the Butte when you saw him on the Butte?

A. They had her on the ways; they were pulling at her.

Q. Did you hear him give any orders?

A. No, sir.

Q. Who was giving orders?

A. Mr. Weaver.

Q. Did he seem to have entire charge of the boat while Mr. Weaver was there?

A. Yes, sir.

Q. Getting her out of there?

102 A. Yes, sir.

Q. Was Captain Murphy on board of the McLeod after she was dropped down to the end of the ways?

A. I cannot positively say whether he was or not.

Q. You say that when the Butte struck the McLeod she did slide entirely off the ways—that is, the Butte did not slide entirely off the ways.

A. No, sir; she was in the water, but seemed to be resting on the ways.

Q. How far did she move the Col. McLeod when she struck her?

A. That I could not tell; she may have moved her 6 or 8 feet.

Q. Whereabouts did she strike the Col. McLeod—what part of the McLeod?

A. She struck her forward of the boilers—struck her forecastle.

Mr. WILSON: I don't know what you mean by forecastle on a steamboat. I would know what you meant by forecastle on a ship.

Mr. DAVIDSON: It is just front of the stairway.

Mr. WILSON:

Q. The Butte stopped when she struck the Col. McLeod, did she?

A. Yes, sir.

Q. Did it part the lines of the Col. McLeod?

A. No, sir.

Q. After the Butte struck the Col. McLeod, if her lines would have been slacked she would have dropped right below the ways, would she not?

A. I don't know.

Q. The current was down stream that night?

103 A. Of course.

Q. And she was floating?

A. Yes, sir.

Q. Would she not necessarily dropped below the ways?

A. If you let the lines go quick enough she would, probably.

Q. It was half an hour before she sunk, was it not?

A. I have always estimated it to be about half an hour.

Q. If slacked in time within that half an hour she would have dropped below the ways?

A. If she could have got clear of the Butte.

Q. How was she attached to the Butte?

A. When she struck her they seem to be locked together like, the Butte lying on her. I don't know as you could have shoved her off; it would have taken a good many men.

Q. Did you make any attempt to do it?

A. No, sir; *but* there was but two of us there. We got a spar and held her head up.

Q. How—upstream?

A. We attempted to hold her head up so that water would not get in so fast.

Q. Whereabouts was the hole in the Col. McLeod?

A. The hole was in the breast hook; perhaps a little aft.

Q. The guard of the Butte went through the guard of the McLeod, did it?

A. Yes, sir; all the guard she has. She has a narrow guard, except nosing, until you get forward; there is a little guard around the forward part.

Q. What part of the Butte was it that struck the McLeod?

104 A. Her side, about where the bend is, where the planks commence bending for the bow.

Q. The bow of the Butte struck the bow of the McLeod?

A. Yes, sir.

Q. Had the Butte a guard along that part of the boat?

A. The guard commenced about there, if guard you may term it—a little projection of the plank sheet.

Q. What was the Col. McLeod lying at the foot of the ways for?

A. Preparatory to going on the ways; she had got ready to be pulled out on the ways.

Q. When Mr. Hazen dropped the Col. McLeod down there in front of these ways did he immediately commence preparing her to be hauled out?

A. She was in position to be hauled out; she was in position, but had not got the straps on her. The straps were ready, but it was so late they did not get ready that night.

Q. Who was going to haul her out?

A. Mr. Weaver.

Q. Was she down there for the purpose of being hauled out by Messrs. C. S. Weaver & Co.?

A. Yes, sir.

Q. You say that Captain Johnson was down there the next day?

A. Yes, sir; the next morning.

Q. What was he doing there the next day?

A. He was looking at the situation.

Q. Did you hear him give any order?

A. I did not; no, sir.

105 Q. What was done with the Butte after the accident?

A. She was dropped immediately below the ways.

Q. By whom?

A. By Mr. Weaver.

Q. You say there was no storm that night. Was the wind blowing at all?

A. Not to my recollection. If it was I did not note it.

Q. How much ice was running in the river?

A. There was a good, big streak of ice.

Q. How thick was the ice?

A. That would be hard to estimate. The ice that first runs in the river is mostly — ice. I could not determine the thickness.

Q. Had it been cold much prior to that time?

A. Yes, sir; we had had a good many cold days.

Q. Many cold nights?

A. Days and nights cold; yes, sir.

Q. It don't have to be very cold to freeze the Missouri river up, does it?

A. I suppose it takes the same temperature to freeze the Missouri river over as it does any other river.

Q. Did it make ice any while you was on that trip?

A. Yes, sir; we had ice above the mouth of the Yellowstone.

Q. You were considerable north of Bismarck when you were at the mouth of the Yellowstone, were you not?

A. Yes, sir.

Q. Was ice running on the way down?

A. I think below Ft. Buford, the last day we ran, we were clear of ice.

Q. What had been the state of the weather the day and night previous to the accident?

106 A. Freezing weather; I know that.

Q. Freezing hard?

A. It was what we term real cold weather—threatening weather, like winter was coming on.

Q. Was it cold enough to freeze the ground?

A. Yes, sir; the ground was frozen.

Q. How much frozen?

A. A crust on top was frozen where it was wet.

Q. How thick a crust do you think was frozen?

A. Really I could not say as to that.

Q. 3 or 4 inches?

A. No, sir; I don't think so.

Q. How thick—2 inches?

A. No, sir; I don't think that.

Q. It had not been very cold then?

A. It had been cold enough to make ice in the river.

Q. Water will freeze on the ground as quick as it will in the river, will it not?

A. It will depend on the nature of the ground whether it will freeze quick or slow.

Q. Dry ground will not freeze at all, will it?

A. It has to have some moisture in it.

Q. When the first cold weather comes the ground freezes before the water in the river, does it not?

A. I had the idea that it was the other way; that ice commenced making in the river before the ground freezes.

Q. Do you think that is a fact; that ice makes in the river before the ground freezes?

A. I think so; yes, sir.

Q. You have an idea, then, that a large body of water would freeze before a small one, do you?

107 A. I don't say that the river freezes up, but the ice commences to make around the edges.

Q. Does not the wind blow more or less up there all the time?

A. Yes, sir.

Q. Was it not a considerable wind blowing at the time of this accident, Mr. Bagley?

A. I could not say whether there was any wind or not; there may have been a breeze and I not know it.

Q. There might have been a great deal of wind and you not have known it?

A. No, sir; if there had been anything out of the ordinary line I would have known it.

Q. Do you know which way the wind was blowing?

A. No, sir; I knew the wind blew that day during the day, but, if I recollect aright, the wind ceased that night, as it frequently does.

Q. When was the Butte moved down below the ways?

A. I don't know.

Q. Was it the next day after the accident?

WITNESS: Moved below the ways, do you mean, after the accident?
Mr. WILSON: Yes, sir.
A. The following day.
Q. What time in the day; the next morning?
A. I think it was afternoon before they got her down.
Q. Do you know whether the Butte was floating when the Col. McLeod sunk?
A. I think her head was hanging on the ways; her stern was floating.
Q. Were there many men around the yard there that day—
108 around the ways?
A. Yes, sir; during the day.
Q. What were they doing?
A. They were laborers around the yard.
Q. What were they doing particularly, if you know?
A. Handling lines.
Q. How was the Butte got off? You say her head was hanging on the ways. How was she gotten off from there?
A. I don't know; I don't think she was hanging very hard. She may have slipped off herself after the McLeod sunk.
Q. How near to the end of the ways did the Col. McLeod sink?
A. She must have sunk right at the end of the ways where they commence in the water.
Q. Was there where she was lying when you last saw her?
A. Yes, sir.
Q. Did she move after she sunk?
A. Not until after the ice went out, the next spring. She did not change her position as to up and down the river; she listed out some.
Q. Simply keeled over owing to the slope of the river bottom?
A. Yes, sir.
Q. She did not move away from the ways any?
A. No, sir.
Q. How far do you think it was from the foot of the ways to the inside guard as she lay keeled over two days after the accident?
A. I could not give a close estimate of that.
Q. To the best of your recollection of the matter.
A. Perhaps 5 or 6 feet; I should judge so.
109 Q. Where did you remain the night after the Col. McLeod sunk?
A. On the McLeod.
Q. Were her upper works sufficiently out of water?
A. Yes, sir.
Q. What time the next day was it that you went up to examine where the Butte had been drawn up on the ways?
A. In the morning.
Q. How early in the morning?
A. Soon after daylight.
Q. Were there men around there during the night when the accident happened or afterwards?
A. There were some there afterwards.
Q. What were they doing?

A. There was nothing done after the boat sunk.

Q. Was there any attempt made to separate the boats that night?

A. There was no attempt made to get the Butte out of position that night, out of that place.

Q. Who was with you when you went up there to examine where the Butte started from?

A. No one.

Q. How thorough an examination did you make; anything more than a casual examination of it?

A. Thorough enough to satisfy myself that she was not securely fastened.

Q. You were pretty well satisfied of that, were you not, when she struck the Col. McLeod?

A. Yes, sir.

Q. It was mere curiosity that took you up there?

A. Yes, sir; just for the gratification of my curiosity.

110 Q. How long have you known Captain Johnson?

A. Since 1872.

Q. Have you known him as a steamboat man during all of that time?

A. Yes, sir.

Q. Do you know whether he is a ship carpenter or not?

A. Yes, sir. I have always heard that he was a ship carpenter. I have heard him say so himself.

Q. He is a pretty competent steamboat man, is he not?

A. Yes, sir; I regard him so.

Q. He knows how to handle a boat well, does he not?

A. I think so.

Q. He bears that reputation, of being a very safe, careful man, does he not?

A. Yes, sir.

Q. When did you first hear Mr. Weaver spoken of as being a competent man to take charge of steamboats; before or after this accident?

A. I have heard him spoken of before this accident; on that very day or the day before.

Q. That was the first that you had heard of it?

A. Yes, sir.

Q. What did you hear said of him then?

A. I merely heard the remark made, but I cannot tell who made it now, that we was green at the business—did not understand it.

Q. That was all?

A. That was all.

Q. Do you know anything about Mr. Hazen's capacity?

A. Yes, sir.

Q. Is he a competent man to take boats out?

111 Objected to by plaintiffs' counsel as immaterial and irrelevant.

A. I regard him as such.

Q. He was foreman of Mr. Weaver, was he not?

A. I do not know whether he was or not?

Q. Did you understand that Mr. Hazen was foreman of Mr. Weaver?

Plaintiffs' counsel objects to all these questions concerning Mr. Hazen because it has not been shown that he had charge of the matter of caring for these boats. So far as this evidence goes it goes to show that Mr. Weaver had charge of the boats and was the contracting party.

Q. You stated that Mr. Hazen was foreman?

A. It was a mere inference on my part.

Q. You judged that from what you saw him doing around the yard?

A. Yes, sir.

Q. He was acting in the capacity of foreman when you saw him there, was he not?

A. Yes, sir.

Q. I think you stated that Mr. Hazen was the man that came up and took charge of the boat, that Mr. Hazen was Mr. Weaver's foreman, in your direct testimony?

A. Yes, sir.

Q. When did this marine pump, the first one, arrive up at Bismarck?

A. I think about 2 or 3 weeks after the accident occurred.

Q. Where was the first pump the day they tried to raise the Col. McLeod with the second pump—the La Crosse pump; was it there still, at Bismarck?

A. I guess it was.

112 Q. Did they use more than one of the pumps in trying to raise the Col. McLeod the second time?

A. I cannot positively say whether they used the siphon the second time or not.

Q. Was the first marine pump simply a siphon?

A. Yes, sir; and at that time there was quite a number of wooden pumps put in—hand pumps.

Q. Those were not put in the second time, were they?

A. No, sir.

Q. Have you ever had any experience in raising boats?

A. No, sir; nothing that could be termed as amounting to anything.

Q. How did you know that the bow of the Col. McLeod was settling down?

A. I judged by her appearance.

Q. From what was above water?

A. Yes, sir.

Q. You made no soundings or anything to ascertain that fact?

A. No, sir.

Q. State whether the machinery to the Col. McLeod had been dismantled prior to her being hauled down in front of the ways.

A. Yes, sir; her cylinder heads had been taken off.

Q. Everything had been put in condition to haul out and put away for the winter.

A. Yes, sir.

Redirect examination by Mr. DAVIDSON:

Q. About how far is it from the town of Bismarck to where these marine boats and ways were on the night of the accident?

113 A. 2 miles.

Q. When Weaver & Co. ceased work at the close of the day did any of them stay down there at the boats or did they go to their homes?

A. They all went to their homes.

Q. At the time of the accident there was only this man you have mentioned as connected with their various boats down there?

A. That is all.

Q. When you went up there in the morning to examine the precautions that had been taken to receive the Butte you say it was soon after daylight; was it before or after Mr. Weaver and his men had come down and renewed work the following morning?

A. Mr. Weaver had come down; I recollect of seeing him.

Q. That is, a crew of men had come and commenced work?

A. No, sir; I did not see any men around that morning.

Q. So far as you know, the shores, or whatever else there was to hold the boat in place, were just as they were when she rode over them and went into the river?

A. Yes, sir; just as they were.

Q. You spoke about the McLeod lying close under the foot of the ways; when the Butte slid down and struck her did not the concussion or the pressure force her out into the stream sufficiently to make space for the Butte to lie in the water?

A. I think the Butte was part on the ways.

Q. But her outer guard rested on the Col. McLeod?

A. Yes, sir; I think the Butte was listed up a little.

Q. Then, when the Col. McLeod sunk, she went low enough to leave the outside of the Butte floating and the inside lying a little on the ways?

114 A. Yes, sir; but what effort had to be made to get her off the ways I don't recollect; she may have slid off herself.

Q. If the Col. McLeod had been dropped below the ways instead of being left lying against the ways that night, was not the situation such, through the coldness of the weather and the ice forming rapidly in the river, that without steam it would have been difficult to bring her up abreast of the ways to haul her out the next morning? Considering the coldness of the weather and the rapidity with which ice was forming, if the Col. McLeod had been drawn in below the ways and not left abreast of them, ready to be hauled out, do you think it would have been difficult the next morning to have drawn her up against the current and the ice without steam?

A. Yes, sir; I would so regard —.

Q. What was the occasion that required Mr. Hazen to get her

down promptly from her position and tying her abreast of the ways ready to be hauled out?

A. The increase of ice.

Q. If she had been left at her old moorings, with the temperature as it was and the ice increasing, was there not some danger that it would close before morning—that the ice would form so rapidly in the river that the next morning she could not be got abreast of the ways and hauled out?

A. That was the supposition at that time.

Q. Was that the reason that she was dropped down?

A. Yes, sir.

Q. You say you don't know particularly what Mr. Hazen said when he came there?

A. No, sir.

115 A. But you know they were anxious to have her hauled out so she would be out of the way of the ice?

A. I suppose he understood just what he went there for when he went to work.

Q. We will go back to those broken timbers. When you say that there was 70 timbers put in her that you class as broken timbers do you mean that there were any timbers that were so badly broken in that one piece of timber was separate from the other pieces?

A. No, sir.

Q. Were they all broken alike or was there different degrees of breaks, and wherever you found a flaw in the timbers you classed them as broken timbers?

A. There were different degrees of breaks, but wherever we could see a break with the naked eye we would call that a broken timber, but the casual observer might not see it at all; it would only be seen by a person that is experienced and is looking for them.

Q. It would require an expert to go over these timbers and pick out the broken ones?

A. Yes, sir; in most of these cases.

Q. Were those timbers broken consecutively or here and there a broken timber and then a sound timber and then 2 or three broken ones, perhaps, and then a sound one, or were they distributed along in the bottom?

A. In her case there were 30 consecutive broken timbers—all broken at one time.

Q. Then how were the others as to being scattered?

A. They were scattered a great deal, the others were.

Q. I am told that there had been forty false timbers or

116 strips put in when she was overhauled in the spring of 1879. In counting to broken timbers did you count these strips as separate timbers or did you count her original timbers?

A. Only her original timbers.

Q. In repairing those timbers did you take out the entire timber extending across the bottom and the cocked hats over the knuckle and the inside timbers, or only such portions of the bottom timbers as was necessary to make it in sound and good condition?

A. We only take out the bottom timbers. If we have to take out anything — take the timbers out clear across, but not the cocked hats, as you term it.

Q. If the bottom plank, where it is cut on the rocks or some other obstruction, show cracks or splinters in the board how do you mend the hole in the plank?

A. It is a rare occurrence where you can put your hand in; that would be a pretty big hole.

Q. About what is the length of the oak plank on such a boat as the Col. McLeod; what is the length of the bottom plank?

A. 60 feet. 30 to 40 feet is about the average length.

Q. Suppose a plank 30 or 40 feet in length in the Col. McLeod needed repairing, would you take out the whole plank, or only so much of it as would be necessary to thoroughly repair that break?

A. Only so much of it as to thoroughly repair it. Some men are very particular, and we may have to take out the whole plank.

Q. When the break is somewhere near either end of the
117 plank don't they simply saw off enough of that plank and take it out as to thoroughly repair that hole?

A. In that case we would put in a grooved piece; you can do that on a plank that is broken clear through, unless you put it in at one edge.

Q. To repair it in a thorough condition, all those bottom planks where the bulkhead was and those 4 or 5 other defects that you spoke of as holes in her bottom, how many feet of oak plank would it have taken, in your judgment?

A. It is the hardest thing for a man to judge of in the world before the boat is out of water. If nothing but the plank you can see is broken you can form some judgment.

Q. From what you saw, what would be your judgment as to the amount of oak plank that would be required?

WITNESS: Board measure?

Mr. DAVIDSON: Yes, sir.

A. 2,500 or 3,000 feet.

Q. Would cover it, in your opinion?

A. Yes, sir.

Q. Were you on the boat that spring when she was repaired up there?

A. No, sir; I went on the boat in August.

Q. In your direct evidence you spoke of making a fall trip to Cow Island and return after this break around which you built a bulkhead. There has been considerable inquiry about her leaks during that trip. Was her condition unusual, as to the leakage, or was it about the ordinary condition of the Upper Missouri river boats at the close or near the close of the season?

A. I should say it was unusual.

118 Q. Did you anticipate any difficulty about keeping her afloat during the absence with her on that trip?

A. No, sir.

Q. If it had been earlier in the season and there had been business for her to do was she in condition to have remained in the

business to the close of the season and do whatever business was before her without being repaired?

A. She was in as good condition when we returned as when we got to Bismarck.

Q. It was, then, at the close of the season when you anticipated the close of navigation?

A. Yes, sir.

Q. You explained that she would make about an inch of water in the lowest part of her in an hour, or perhaps something in that vicinity. Was that in one hour or in three hours?

A. 3 hours.

Q. How often in the 24 hours did you pump her after she was pumped out with the steam engine, with the steam pump?

A. I presume half a dozen times. Pumped her dry fully a dozen times.

Q. Do you mean in all that time or half a dozen times in the 24 hours?

A. Half a dozen times in the 24 hours.

Q. After you had pumped her out before going to bed did you try your pumps in the night usually, or did you let her rest until the next morning?

A. I walked about up to 11 o'clock, and if she had any
119 water in her at that time I would pump it out, and then early in the morning.

Q. When you saw Captain Johnson on the Butte and she was being pulled up onto the ways where was he on the Butte—what part of the boat?

A. On her boiler deck.

Q. Were you near enough to hear if he had given any orders or directing?

A. No, sir; he may have given orders without my hearing him.

Q. You don't know whether he was giving orders or not?

A. No, sir.

Q. Her tackling was then fastened to her and she was sliding up the ways?

A. Yes, sir.

Q. Was Mr. Deitz also on board of the Butte?

A. Yes, sir.

Q. These men that you speak of as watchmen are men that stay on the boat to keep thieves from stealing pieces of machinery and looking after her generally?

A. Yes, sir.

Q. Then when you speak about never having received any instructions from Mr. Murphy as to what your duties were as watchman you knew what the duties were; you did not need any instructions?

A. I knew what my duties were. I did not ask for any instructions.

Q. After the Butte had collided with the McLeod and sunk her you say she was dropped directly below the ways. Did Mr. Deitz or Mr. Weaver manage that, or do you know?

120 A. I suppose it to be Mr. Weaver. I don't know; Mr. Deitz was at work all the time. I know that, but I could not say as to the real management.

Q. Did you see Captain Johnson aboard of her when she was being dropped down?

A. I don't think I did. My recollection is that I did not see him at that time.

Q. When the Butte was being dropped in front of the ways and the tackling being made fast for hauling her out was not Mr. Johnson then constantly conferring with him and counselling with him about it—how to make fast and secure everything?

A. That I did not know.

Q. You were then on board your own boat, the Col. McLeod?

A. Yes, sir.

Q. That was far enough away that you could not hear distinctly any ordinary conversation?

A. No, sir; I could not hear what they said; I could hear their voices, but not what they said; I would look down occasionally and see who was there, for I knew the men or knew what they were.

Q. Did you have any talk with Mr. Weaver about this matter the next day—how it occurred?

A. Not a bit.

Q. When did you first hear or know about anything being said about the unusual blowing of the wind that night?

Objected to by defendants' counsel as incompetent and immaterial.

A. I saw an account of it in the Bismarck paper.

Q. Was it in the Bismarck paper the day after the accident or within a few days after the accident?

121 A. It was within a few days after the accident, and may have been the next day.

Q. And the circumstances of the accident were then fresh in your mind, were they not?

A. Yes; yes, sir.

Q. Did you talk with other men there around the boat as to whether there was any wind or not?

Objected to by defendants' counsel as incompetent, irrelevant, and immaterial.

A. I did.

Q. With your memory refreshed by this article in the paper stating that there had been a hurricane or high wind, were you able then to recollect anything about an unusual wind?

A. I was not; no, sir.

Q. The statements that there had been a high wind that had shaken her off the shores produced a sort of a smile, did it not, with men around the boats?

A. I think it did.

Q. You say that this man, Mr. Hazen, so far as you know, was a competent man?

A. Yes, sir.

Q. Do you know whether he had charge of or did the shoring to secure the Butte, or Mr. Weaver?

A. I don't know.

Q. Was Mr. Weaver there personally superintending and managing this business?

A. Yes, sir.

Q. Was Mr. Hazen down there the next morning at the boat?

A. Yes, sir.

Q. Did you have any talk with him about the manner in which the Butte had been secured?

A. Yes, sir; we had some conversation in regard to the
122 general management.

Q. What did Mr. Hazen say about it?

Objected to by defendants' counsel as incompetent, irrelevant, and immaterial.

A. He said that he was not allowed to do what he thought fitting and right.

Q. What else?

A. Directly bearing upon the shoring of the boat; I don't know as I had any conversation with Mr. Hazen.

Recross-examination by Mr. WILSON:

Q. Did you have anything to say or do about the time that the Col. McLeod was being dropped down to the end of the ways to be drawn out?

A. No, sir; there was nothing incumbent upon me to do or assist Mr. Hazen.

Q. As to the manner it was being done and the reason for doing it you had nothing to say?

A. No, sir; but I inferred what the reason was.

Q. It was a mere interference that you had. The reason for dropping her down was not given by anybody?

A. I don't recollect that it was, but it was about the ice.

Q. If she had been allowed to remain where she was moored that afternoon over night she could have been moved down the next morning without any trouble, could she not?

A. That I don't know.

Q. What was the condition of the weather the next morning?

123 A. It would have been very difficult, for there was a great deal more ice.

Not being able to complete the taking of said depositions by reason of the absence of witnesses, I adjourn the further taking of the same until Thursday, January 12th, 1882, then to be continued at the same place and between the same hours mentioned in the stipulation.

[NOTARIAL SEAL.] PAUL F. COOK,
Notary Public, City of St. Louis, Mo.

Pursuant to adjournment, as above stated, on the 12th day of January, 1882, I continued the taking of said depositions as follows, viz:

NELSON G. EDWARDS, of lawful age, being produced, sworn, and examined on the part of the plaintiffs, testified as follows, to wit:

Direct examination by Mr. DAVIDSON:

Q. What is your name, age, residence, and occupation?

A. Nelson G. Edwards; age, 31; residence, St. Louis, Mo.; clerk at the carpet store of Rennard and Sens.

Q. How long have you been in the employ of this firm?

A. Since March, 1881.

Q. Prior to that time how were you employed for 2 or 3 years?

A. For two seasons I was clerk on the steamer McLeod.

124 Q. How much experience have you had in all in steamboating?

A. I was on the river for 3 years.

Q. In any other capacity than clerk?

A. The last year I was on the river I was pilot.

Q. Where was the Col. McLeod running?

A. She was running from Bismarck to Benton.

Q. Have you more or less knowledge of the Upper Missouri river boats running in the same trade—the Yellowstone trade?

A. Yes, sir; I used to see them continually passing and repassing between Bismarck and Fort Benton.

Q. You run on the Col. McLeod, then, did you—in the season of 1879, did you?

A. Yes, sir; from the time she was built; I was on her when she first came out.

Q. How did she compare with other boats in the Upper Missouri for that trade?

A. She was built expressly for the trade and was very well adapted for it; she was about the lightest draft boat in the Upper Missouri river, it was stated.

Q. About what time did she reach Bismarck after making her last trip, the one in which she only went as far as Cow Island and then came back to Bismarck and laid up. Can you give the date?

A. My recollection is we got there on the morning of November 12, 1880.

Q. Have you any books or data by which you can fix that date quite readily, and did you consult them?

A. Yes, sir; I have my postage book of the boat.

Q. Did you examine that this morning?

A. Yes, sir; and it says that the part of the crew that

125 left the boat the day we got there was paid off on the 12th and the balance of the crew were paid off on the 13th of November.

Q. So you are positive that the date of your arrival at Bismarck was the 12th of November, 1879?

A. Yes, sir.

Q. Do you remember about what time in the day?

A. In the morning.

Q. How long did you stay with the boat after the 12th, and what time did you leave her to go home?

A. I think I left Bismarck on the evening of the 14th of November.

Q. From the time she arrived there—that is, on the morning of the 12th, until you started to go home, on the evening of the 14th—did you stay on board of the boat, or did you leave her and go to town?

A. The night before I left I stayed uptown at the hotel.

Q. Prior to that date you stayed on the boat?

A. Yes, sir; during the day I left I was on her.

Q. Who was in charge of the boat at the time you left her?

A. Capt. Paul Murphy was captain of the boat.

Q. Were there any other of the crew or employees still on the boat?

A. I do not know particularly; I suppose there were others.

Q. Was the carpenter of the boat there?

A. I don't recollect that he was; I presume that he was, though; there were several men on the boat at the time I left; I don't remember who they were.

126 Q. What condition was the boat in when you made this last trip to Cow Island and return, as to injuries to her hull received in low-water navigation?

A. I never examined the boat's hull; I don't know positively, but I know that she was leaking some, and that is all I know about it.

Q. So far as you have knowledge and from your interviews with the other officers of the boat, was she considered safe or unsafe to take that last trip to Cow Island and return; was she in such condition that it was considered safe for her to undertake the trip?

Objected to by defendants' counsel as calling for the opinion of the witness and as hearsay statements.

A. My opinion is it was safe to make the trip. I don't remember of talking to anybody about it—about the advisability of her going or not going, so far as the condition of the boat is concerned.

Q. That was a matter of which you did not have special charge?

A. No, sir; I don't think it was talked about. The principal trouble was about whether we could get back from the trip. There was some objection to going on that account.

Q. What was the stage of water in the last trip?

A. A fair good stage.

Q. Better than it had been the previous trip?

A. Very much better than on the previous trip.

Q. Was the Col. McLeod put in good repair at the opening of the season of navigation of 1879 at Bismarck?

127 A. Yes, sir.

Q. Who was commander or master of her at the time this work was done?

A. Capt. John J. Massey.

Q. Do you know who had charge of the details of the repairs—superintending it?

A. Capt. Massey did.

Q. She was hauled out there?

A. Yes, sir; on the ways at Bismarck. This was in the winter of 1879 & '80.

Q. Or was it in 1878 & '79—the boat was not built until 1879, and she sunk in 1880, did she not?

A. Yes, sir; this was in the winter of 1878 and 1879.

Q. As clerk were you not disbursing officer of the boat?

A. Yes, sir.

Q. Do you know about what her repair bills and cost of taking care of her, etc., for that winter was—1878 and 1879?

Objected to by defendants' counsel as incompetent.

A. It was about in the neighborhood of $1,100.

Q. State what that included.

A. That included the bills for the lumber and spikes, the watching of the boat during the winter, and the board of the watchman, I think. It included the whole winter expenses of the boat.

Q. Did that include the labor and all materials and for hauling her out, and expenses from the time she was taken out of the river until she was put back?

A. Yes, sir.

128 Q. That is all included in that bill of expenses?

A. Yes, sir.

Q. When the boat was laid up on the 12th of November, at Bismarck, what was her general condition and fitness for business in other respects than those leaks that you have mentioned in her bottom; aside from that, what was her general condition and fitness for business?

Objected to by defendants' counsel as incompetent.

A. She was thoroughly equipped for business; had just got in off the trip and was all right, so far as I know.

Q. If it had been earlier in the season and there had been business to do was there any reason that you know of that would have prevented her from having gone on another trip or trips?

Objected to by defendants' counsel as incompetent.

A. No, sir.

Q. During your experience on the Upper Missouri river did you become acquainted with the value of steamboats employed in the Upper Missouri river business, more or less?

A. Yes, sir; I have talked about the values of boats with the other boatmen and have an idea of what the values were.

Q. Did you have any knowledge as to what some of the boats then employed had cost or what they had sold for?

A. I don't know of any sales up there except the Eclipse sale. I was there. I don't remember what she sold for.

Q. Was she sold at ordinary sale or at marshal's sale?

A. I think at marshal's sale by the court.

129 Q. Being the disbursing agent and financial man of the boat you knew of the earnings and her capacity for business, did you not?

A. Yes, sir.

Q. From all these facts, your knowledge of the value of steamboats employed in the Upper Missouri river and of the capacity and fitness of this boat for that especial business, state, in your judgment, what—her reasonable and fair value at Bismarck in her then condition at the date when she was laid up there.

Objected to by defendants' counsel as incompetent and irrelevant, as witness has not shown himself competent to testify.

A. I should say she was worth at least $12,000.

Q. Did you make any contract with C. S. Weaver & Co. or any one else in reference to hauling her out on the ways and repairing her?

Objected to by defendants' counsel as incompetent and irrelevant, as witness has not shown himself competent to testify.

A. No, sir; I did not.

Q. Had you any knowledge of any such contract being made by any of her officers or owners, or both, of the boat with C. S. Weaver & Co.?

Objected to by defendants' counsel as incompetent and irrelevant.

A. No, sir.

Q. Did the Col. McLeod receive any injuries on this last trip to Cow Island?

130 A. No, sir. She was only loaded light and the river was in good condition. We had less trouble, I believe, on the last trip than almost any trip we made during the season.

Q. Then whatever injury she had sustained to her hull was incurred on prior trips preceding the one made to Cow Island?

A. Yes, sir.

Cross-examination by Mr. WILSON:

Q. What part of the crew did you pay off on the 12th?

A. I paid off one of the pilots and two other men with us on the trip and Mr. Bagley; there may have been others, but I don't remember. I paid off the rest of the crew, except the captain and myself, on the 13th inst.

Q. And discharged them from the employ of the boat?

A. I think they were. Some of them were about there after I left; after I left the boat on the 13th — were around there.

Q. They were discharged after the 13th?

A. So far as I know.

Q. After the 13th they had no further duties to perform?

A. That is, the old crew. I don't know what crew were employed there after I left. The captain and myself I paid off in the night up to the night of the 14th.

Q. You paid off Mr. Bagley as ship carpenter?

A. Yes, sir.

Q. Do you know of his being employed to remain longer than that?

A. I made no contract with him at all.

Q. Did you know of any having been made with him?

A. No, sir.

131 Q. Did you know he was the watchman on the boat and would be during the winter?

A. I cannot remember; but it is my impression that Mr. Bagley was staying on the boat as watchman; there was some talk about it. I don't know whether he did or not.

Q. He had been discharged as carpenter of the boat and paid off?

A. Yes, sir; the whole crew was paid off.

Q. Where were you during the winter of 1878 and 1879?

A. I was in St. Louis most of my time.

Q. Where was the steamer McLeod?

A. Laid up at Bismarck.

Q. How did you know who superintended the repairs on the Col. McLeod in the winter of 1878 and 1879?

A. I know from the fact of Capt. John Massey leaving here and going there and saying that he was to superintend the repairs, and he did go there, and when I got there in the spring, in April, he was there; that is my only knowledge. Of course, he told me that he was in charge of the boat afterwards.

Q. You only know what you were told?

A. No, sir. I was not there from November until April.

Q. You know nothing about the repairs that were put upon her, except from the bills that were paid?

A. That is all.

Q. I believe you stated that you knew of no steamboats being sold in that vicinity in the winter of 1879?

A. No, sir; not at Bismarck, except the Eclipse.

Q. There were quite a large number of boats there, were there not?

A. Yes, sir.

132 Q. And the business was very dull?

WITNESS: Do you mean laid up?

Q. Business was dull for boats in the river?

A. No, sir; not with us. I don't remember of any boats being laid up except the Eclipse, and she was in trouble; she was used from time to time, and her crew waited there at Bismarck that season.

Q. Steamboats were not regarded as very valuable property in the Upper Missouri river that year, were they?

A. I hardly know how to answer that question. I don't think they made a great deal of money.

Q. Freights were very low on the Upper Missouri river that year, were they not?

A. They were lower than they were last year. I don't remember what the Government contract price was.

Q. There was a great deal of competition among the boats, was there not?

A. There was not much business there, except the Government business and the business of T. C. Power & Bro.?

Q. Your boat was not engaged in the Government business?

A. No, sir.

Q. Outside of the Government business the rates were very low, were they not?

A. I don't know what our rates were; our rates were made under contract with Powell & Bro. I don't know what the regular freight rate was.

Q. Is it not a fact that steamboat property in the Upper Missouri river in 1879 was not in a very good demand?

A. I could not tell you about that, for I do not know.

133 Q. How do you get at the value of the steamboats, then?

A. I judge of the value of the boat by the amount of money that was put in her and her age and condition.

Q. Did you ever build a boat?

A. No, sir.

Q. Did you ever have a boat built?

A. No, sir.

Q. Did you ever sell a boat?

A. No, sir.

Q. Then the valuation you have given of this boat is simply what you think she ought to bring in consideration of what she cost?

A. Yes, sir; and her condition and where she was; steamboats were worth more there than here.

Q. This was in 1879?

A. Yes, sir; if you should build a new boat and take her up there she would be worth more there than she would here.

Q. How much do you think that boat could have been sold for at Bismarck in the fall of 1879?

Objected to by plaintiffs' counsel as irrelevant and immaterial.

A. I don't know, because I don't know who would want to buy her.

Q. Do you think she could have been sold at any price in Bismarck or in that vicinity?

A. I don't know. It would depend upon whether anybody wanted to buy a boat or not.

Q. You did not know of anybody that wanted to buy?

A. No, sir.

Q. Do you think she could have been sold for the value you have fixed on her at Bismarck?

134 A. If anybody had brought a purchaser there I think probably she could. I do not know.

Q. Can you swear that you think that boat could have been sold for $12,000 at Bismarck in the fall of 1879?

A. If there was anybody in the market buying steamboats of that kind I think it could.

Q. You didn't know that there was any one in the market buying steamboats at that time?

A. No, sir.

Q. Was there any demand for steamboats there at that time?

A. Not that I know of.

Q. Captain Murphy, I think you said, was paid up to the night of the 14th?

A. Yes, sir; that was the end of the trip when I was through with the boat. I closed up my trip and servered my connection with the boat, except settling up here in St. Louis when I got back.

Q. How much did she leak on that trip? Did they use that pump?

WITNESS: The siphon pump, do you mean?

Q. The steam pumps?

A. They used them most of the time.

Q. How many pumps did she have?

A. I think she had two siphon pumps.

Redirect examination by Mr. DAVIDSON:

Q. Did the owners of the Col. McLeod want to sell her that fall?

Objected to by defendants' counsel as immaterial.

A. Not that I know of.

Q. She was under rates of freight fixed by Powell & Co.?

135 A. Yes, sir.

Q. Did you have good rates?

A. Yes, sir; I suppose you would consider them good rates.

Q. As a matter of fact, was there plenty of freight all the time that season for the boat?

A. There was for us more than we could carry.

Q. This last trip being made so late in the season, why was it undertaken?

Objected to by defendants' counsel as incompetent and immaterial.

A. There was some freight there that Mr. Powell was very anxious to have taken up there in the fall, and as we were there at Bismarck he got us to do it.

Q. He was very anxious to have it go through?

A. Yes, sir.

Q. When did the other boats stop; about what time that season?

A. I think the Butte was out on that trip; she was at Cow Island that trip, is my recollection, and arriving at Bismarck 2 or 3 days before we did.

Q. Were the other boats laid up in October, or were they running as late as the Butte and the Col. McLeod?

A. They were not running so late as the McLeod unless there were boats running to Ft. Buford; I don't know that.

Q. On the Upper Missouri what is the custom in paying the crews; are they paid at the end of the month or at the end of every trip?

A. We paid on our boat at the end of every trip—that is,
136 the deck crew and nearly everybody except the captain and the pilots and the clerk.

Q. You settle with them at the end of the trip?

A. Yes, sir; and arrange with them for the next trip.

Q. Then when you paid off on the 12th and 13th you closed up the business of the boat just as you closed it up at the end of all other trips during the season?

A. Yes, sir.

Q. You had nothing to do with discharging or keeping the crew? That was the business of the master of the boat?

A. That is all. They came to me and got the money.

Q. And whose province was it to select a watchman or any other man to leave on the boat and instruct him?

A. The captain's.

Q. Then when you say you paid the captain off on the 14th of November do you mean to say that he then quit work, or did he simply receive his wages up to that date?

A. I finished up the trip and paid off every man on the last trip of the boat, including myself.

Q. And the captain remained in charge of the boat?

A. Yes, sir; he still remained in charge of the boat.

Q. Are you certain there was two siphon pumps on the Col. McLeod, or was there but one?

A. I am pretty sure there were two.

Q. You think there were two?

A. Yes, sir.

Q. You don't know how often they used them or any pump on the trip, do you?

A. On the trip up they were used a good deal of the time.
137 Coming down they were not used so much, because the boat was light—no freight on her—and she did not take much water.

Q. When you say "a good deal of time" do you mean that they were used continuously or at intervals of an hour or two and then rest an hour or two?

A. They were used whenever the water in the boat required it.

Q. Did that depend somewhat upon the speed with which she was navigating or the rapids she encountered?

A. I don't know as that would have any effect on her, but on the trip up she was loaded down to the water, and of course would naturally take more water than she would when she was light.

Q. As to that matter, using the pumps to keep the water out of her—out of the hold—was that a matter that you had any charge of or had any special occasion to look after?

A. No, sir.

Q. Whose business was it?

A. The engineer's.

Q. Who would have charge of looking after the condition of the pumps and the leaks in the boat, and so on?

A. The engineer looked after the condition of the boat and the mate looked after the leaks and kept the water out of the hold.

Q. Who was your mate?

A. I don't recollect his name; Andrew somebody.

Q. Was either of the pilots on the boat when you quit staying on board of her?

A. They were. Mr. McClenden was on board when I left her.

Q. Were you back to her at all after you left her on
138 the 14th of November?

A. I think that I left the boat on the evening of the 13th. and went uptown and stayed all night and went down to the boat the next day.

Q. I mean after you left Bismarck to go home.

A. No, sir; I never saw the boat after I left there.

Q. How was it as to cold weather; coming down on that trip was there any ice in the river?

A. Yes, sir. There was some floating ice.

Q. When you left Bismarck was it cold; was it below the freezing point?

A. No, sir. It was very pleasant, bright weather when I left there.

Q. On the 14th of November?

A. Yes, sir.

Recrossexamination by Mr. WILSON:

Q. You said you paid off every trip?

A. Yes, sir.

Q. You paid off the hands and discharged them at the close of the season, did you not?

A. I paid off the whole crew, but I did not discharge anybody.

Q. But Mr. Clenden was discharged with the rest of the crew?

A. He was paid off.

Q. You say that it was very necessary that that freight should go up; whose freight was that?

A. I don't remember what the freight was now, whether it was British freight or not. I don't remember what we had on the last trip.

Q. Do you remember whether the owners of the boat took a contract to deliver that freight that fall or not, at the time the boat was there?

139 A. No, sir; all I know is that Mr. Powell was there and insisted on the boat going back.

Q. You don't know what created the necessity of the freight being there?

A. Only that it was there at Bismarck and he wanted it to go; that is all.

Q. You say that there was more freight than you could carry that summer?

A. Yes, sir.

Q. There was a good deal of competition about the carrying of that freight, was there not?

A. I don't know, because the freight contracts were all made in the East and we received the freight from the agent at Bismarck when it came. I knew nothing about any freight contract.

Capt. JOHN T. MASSEY, of lawful age, being produced, sworn, and examined on the part of the plaintiffs, deposeth and saith:

Direct examination by Mr. DAVIDSON:

Q. What is your full name?
A. John T. Massey.
Q. What is your age, place of residence, and occupation?
A. I am about 50 years of age; residence, St. Louis, Mo.; I have been a steamboat man.
Q. About how many years?
A. About 28 or 29 years, I think it is.
Q. In what capacity generally have you run; were you an officer on the boats on which you have run?
A. I have been pilot and captain during my steamboating.
Q. Have you been owner or part owner of any steamboats?
140 A. Yes, sir; I have had more or less interest in steamboats since I have been steamboating in different boats.
Q. How many different boats have you owned or been part owner in?
A. I don't recollect the number now; some 6 or 7.
Q. Did you have any interest in the Col. McLeod?
A. Yes, sir; I had.
Q. Part owner?
A. Yes, sir; part owner.
Q. How many years have you run in the Upper Missouri river trade—that is, above St. Louis, from the mouth of the Missouri up in different parts of the Missouri river?
A. I have been steamboating on that river, more or less, every season for nearly 8 or 9 years, I think it is—that is, during the steamboating season.
Q. Since there has been anything of a trade in Montana have you been continuously on the Missouri river as an officer of a boat?
A. Yes, sir.
Q. And interested as an owner?
A. I have been there off and on nearly every season since steamboats have been run from Ft. Benton, Montana—that is, with the exception of two seasons, I believe it is, as pilot.
Q. Did you ever have anything to do with hauling out vessels with sliding ways and having them repaired and overhauled?
A. Yes, sir; I have had some experience in that.
Q. At what ways or what points on the Missouri river?
A. The Col. McLeod, at Bismarck.
Q. Did you ever haul any other boat out there or else-
141 where in the Missouri river?
A. No, sir.
Q. Did you elsewhere?

A. No, sir; I have been interested in boats that have been hauled out, but did not haul them out myself.

Q. Did you ever command the Col. McLeod?

A. Yes, sir.

Q. From what time to what time, about?

A. I took charge of the Col. McLeod and took her up into the Missouri river from here; it was the season before she was lost; I think it was in July some time; she was then a new boat starting on her first trip up the Missouri river; from that time up until, I think, along in May—about the 8th of May.

Q. Of 1879?

A. Yes, sir; I don't recollect the year, but it was the season that she was lost, 1879; was it not?

Q. Yes, sir; she was lost in 1879. You commanded her up to about the 8th day of May of that season she was lost?

A. Yes, sir.

Q. What kind of a boat was she for that trade as compared with other steamboats in the Upper Missouri trade?

A. I thought her to be a very good steamboat for that trade.

Q. Was she built especially for that trade?

A. Yes, sir; that is what she was built for.

Q. Were you familiar with her construction—the timbers in her hull? Did you ever examine her carefully?

A. I have looked at her a good many times and have worked on her, but as to the exact dimensions of her timbers I do not know.

Q. Was she hauled out and repaired during the winter
142 prior to the time she was lost?

A. Yes, sir.

Q. Where at?

A. At Bismarck.

Q. On the same ways she was lost at?

A. I don't know whether it was on the same ways or not, but I think it was.

Q. They only had one set of ways there that you know of?

A. No, sir; not that I know of—some material for the purpose of pulling boats out.

Q. Who superintended her hauling out and repairs at that time or the time you speak of that winter?

A. There was a man there by the name of Braitworth that constructed the ways.

Q. I mean especially who had charge of the Col. McLeod during the time she was being overhauled and repaired?

A. He pulled her out and had charge of her at the time. I had left the boat there for the purpose of being pulled out. The ways were not finished at the time when I laid her up and I left him there in charge to pull the boat out when the ways were finished, and which he did after I left there.

Q. Did you give her any examination to see what repairs would be necessary?

A. No, sir; nothing more than when she was floating in the river.

Q. What time did you go back to her after you left her?

A. It was the next spring.

Q. Had she been on the ways?

143 A. Yes, sir; she had been that winter.

Q. Did you examine her to see whether repairs were done to her?

A. I was there at the time the repairs were done. I superintended it.

Q. State what repairs were put on her.

A. I think it was some 40 new timbers and parts of new timbers that were put into her; some whole timbers and some parts and some plank in her bottom. I do not recollect the amount, and we gave her a caulking and what we call a general overhauling.

Q. When you caulked the bottom of the boat did you pitch it?

A. Yes, sir.

Q. Did you hear the testimony of Mr. Bagley, her carpenter, as to her condition when she was laid up, at the close of the season of 1879?

A. Yes, sir; I heard him give his evidence here yesterday.

Q. You heard his evidence?

A. Yes, sir.

Q. Taking his testimony as a correct statement of the repairs that were to be done, as to the number of broken — and plank on the bottom that were defective, say how the amount of repairs necessary to put her in the condition that he described her compares with the amount of repairs that were done on her the preceding winter.

Objected to by defendants' counsel as incompetent.

A. I don't know. I don't think there would have been a great deal of difference as to the amount of work that would have to be done from the description he gave of the damage to the boat.

144 It appears from the description that he gave of it that the injury was about the same as it was when we repaired it. Probably there may have been a few more timbers broken, from his description, than when I repaired it.

Q. From your knowledge of the cost of the repairs that were done at Bismarck on the boat the preceding winter and your knowledge of the cost of materials at that point, what would you say would be the difference in the cost between the repairs on the boat at Bismarck and St. Louis?

Objected to by defendants' counsel as incompetent, because the witness has not testified that he knows anything about the cost of materials at that time, either at Bismarck or St. Louis.

A. I don't know what the difference would be. I don't think it would be a great amount, but I think it would cost something more at Bismarck than here.

Q. Do you know whether there was plenty of freight for the Col. McLeod during the season of 1879?

WITNESS: That was the season she was sunk.

Mr. DAVIDSON: Yes, sir.

A. It appears that there was all that she could handle; fully as much or more. She was kept busy all the season, and, I think, there was some business left here that she could not accomplish.

Q. What boats in the Missouri river trade have you commanded besides the Col. McLeod?

A. I don't know; several of them.

Q. Name some of them.

145 A. I was commander and owner of the McDonald, Silver City, Yellowstone, and Stockdale. These are boats that I have been commander of and owner in. I have commanded several others; I don't recollect the number; the Rose Bud and the Dakota; I don't recollect how many; some several of them.

Q. What are the special dangers in navigating the Upper Missouri river to boats in low-water season?

WITNESS: Dangers of injury to or loss of boat—destruction of it?

Mr. DAVIDSON: Yes, sir.

A. The most danger is in time of low water in the way of rocks.

Q. Rocks in the bottom of the river?

A. Yes, sir; and snags.

Q. Is it common and usual or otherwise for boats at the end of a low-water season to be pretty well banged up in the bottom?

A. Boats running there in low water are more or less used up at the time that the work of the season is over. Some are lucky enough to come out not used up very much and others used roughly.

Q. Have any of these boats you have navigated as master been injured in the hull so as to make it necessary to bulkhead them in order to keep them afloat during the season?

A. Yes, sir.

Q. State any case that you may have in mind.

A. I have had to do that kind of work with them several times. I had to do it last season with one.

Q. What boat?

A. The steamer Rose Bud.

Q. What is the practice when boats get holes in them? Are

146 they taken off on docks to be repaired in the midst of the season, or are they bulkheaded and continued in their work until they are through with the season?

A. They generally have to make the best of it they can. If the boat is injured in such a way that it is impossible for them to work with them any longer we have to repair her in some way. Sometimes we can repair the damage and continue work with a boat as well as we can by going to a dock.

Q. From the description the carpenter gave here in his testimony of the condition of the hull of the steamer Col. McLeod, when she made her last trip to Cow Island and return, in your judgment as a steamboat man, was there anything in her condition that materially deteriorated her value or decreased the price at which she could have been sold beyond the cost of making the necessary repairs to put her in good condition for the next season's business?

A. No, sir; I would not think there was. A steamboat may be injured and be repaired and be just as useful as though the accident had not occurred.

Q. Did the owners of the Col. McLeod want to sell her that season or fall?

Objected to by defendants' counsel as incompetent.

A. Not that I know of.

Q. Taking into consideration her age, character, and capacity, her fitness for that trade, and the condition in which she was at the end of the season when laid up at Bismarck, as described by Mr. Bagley in his testimony, what would you say was her reasonable and
147 fair value to her owners at Bismarck, of the Col. McLeod, on or about the 17th day of November, 1879?

Objected to by defendants' counsel as incompetent.

A. All that I would have to judge from would be from what interest I had in the matter and the prospects of what we had in tow and used the boat for. I would not have cared to have sold any parties at less than $15,000.

Q. At the value of $15,000 for the whole thing?

A. Yes, sir.

Q. Then, to the best of your judgment, you would fix that as a fair valuation of the boat in her then condition?

A. Yes, sir; I would think that would be her value; I do not think she could have been replaced for less than that. (Objected to by defendants' counsel.) It appears that there had been all the business that steamboats could do, more especially boats that were managed as she was. She had all the business that she could do or would have done if she had lived longer.

Q. She had all the business that she could do from the time that she went into the river until she sunk?

A. Yes, sir; all she could do.

Q. What is the custom up there with reference to having the crews on vessels; are they paid at the end of each trip or by the month, usually?

A. They are generally paid for the time they are employed on the boat; it is generally at the end of each trip that is made.
148 Some commenced their wages at the end of the trip; some go longer.

Q. If they needed them they were rehired for the succeeding trip?

A. Yes, sir.

Q. Have you any personal knowledge of any contract being made on behalf of the owners of the Col. McLeod with C. S. Weaver & Co. or any one else to haul that boat out on the ways the winter she was lost?

A. I have not; I knew nothing of the facts of the business after I left at all, except from hearsay; I think it was the 8th of May when I left the boat that season.

Q. What was the occasion of your leaving, Captain?

A. I got both of my legs broken.

Cross-examination by Mr. WILSON:

Q. You have had boats hauled out frequently that have been in your charge for repairs on the ways?

A. Boats have been hauled out that I was interested in; I never superintended it myself.

Q. But where you have been captain of the boat?

A. Yes, sir.

Q. In whose charge is the boat when it is hauled out—what is the custom?

A. It is sometimes in charge of the owner of the boat or the captain or the manager of the boat, and sometimes they contract, I think, to have them hauled out by the ways companies.

Q. Is it not the usual custom on the Missouri river that when a boat is to be hauled out it is surrendered to the owner of the ways, and he superintends her in hauling out?

149 Objected to by plaintiffs' counsel as immaterial, and on the further grounds that this case is not to be covered by any general custom, but by special contract if there was any such contract in the case.

A. I believe there is generally some understanding about the matter when a boat is to be taken out on the ways.

Q. As to who is to be responsible for her?

A. No, sir; how this work shall be done.

Q. Who takes charge of the boat for the purpose of hauling her out?

A. As I say, sometimes the man who is managing the ways company, whoever that may be—whoever makes this contract; where a man contracts to do the work, then the boat is placed in his hands, and he takes charge of her and handles her, I suppose, to suit himself in doing these repairs, if he agrees to do their work, and sometimes a boat is hauled out, the owners or captain or manager superintending the work.

Q. Who superintends the hauling out on these occasions?

A. Sometimes the owner of the boat or the captain.

Q. How as to the ways company?

A. They usually take the boat in possession and do the work.

Q. Is it usual to contract for the use of the ways and surrender the boat to the ways company to be hauled out?

A. Yes, sir; there is generally some understanding.

Q. Is that the general custom?

A. I suppose it was.

Q. Is it not usually the custom that when a boat is to be hauled out to winter on the ways that the agent or employees are the men who manage the hauling out?

150 A. Generally there is some understanding; most always some understanding, so far as my experience goes.

Q. Do you know of any instance where the capt. took charge of the hauling out of his own boat?

A. Yes, sir; and I think they done that this season at Bismarck at the time they hauled the Col. McLeod out.

Q. Do you know that to be a fact?

A. That is my understanding; that is the way we understood our contract in the spring that the work was to be done.

Q. What contract are you speaking of now?

A. The spring that I superintended the hauling out and the directing the repairs to the McLeod. There was an understanding with the company or with the man who managed this company. This man, Mr. Braithwait, apparently was the man who constructed the ways for this company, and we got the privilege of hauling out on these ways until spring, and the company or the owners of the boat or captain of the boat, at least I did myself superintend the repairs and management of the boat from that on and the repairing of her.

Q. Who took charge of the boat for the purpose of hauling her out?

A. That I don't know, for I left the boat there.

Q. Was it not done by the ways men or owners of the ways, or both?

A. It was done by them partly and partly by the owners of the boat or captain.

Q. I thought you were the captain?

A. I was; but not at that time. I had left it for this man Braithwait to do for me.

Q. He was sup't of the ways, was he not?

A. Yes, sir; and he managed the boat for me.

151 Q. You made your contract for the use of the ways with Mr. Braithwaite?

A. Yes, sir.

Q. You gave so much for the use of the ways; you agreed to pay him so much?

A. Yes, sir; and for all expense of the labor.

Q. For the repairs?

A. And hauling out, too; I paid the labor.

Q. You did not superintend the hauling out, but simply the repairs?

A. I did not myself, but Mr. Braithwaite did for me; and I believe, so far as I understood it, each owner of a boat or captain or manager did his own work in the same way and superintended the work of hauling them out that season.

Q. Capt. Braithwaite, you mean?

A. The captain of each boat.

Q. You were not there and don't know how that was?

A. No, sir; those boats that were hauled out that season were all on the ways at the same time, and my understanding was that we were all covered by the same rules and contract with the ways company.

Q. Were those contracts in writing or verbal that year?

A. I don't know whether they were in writing or not; just verbal with me, and a man did my portion of the work for me.

Q. And you employed Captain Braithwait as agent for the dock company?

A. He was acting as agent for the dock company, and I made arrangements with him to take charge of my boat in my absence and do the work of pulling the boat out on the ways when he got them finished, and which he did.

152 Q. You made an agreement with him by which you were to pay him for the use of the ways, did you not?

A. Yes, sir; all we were to pay him was for the use of the ways was so much per tonnage—custom-house measurement.

Q. He was to charge for hauling out the boat, you say, on the ways that winter?

A. Yes, sir; we did not pay him anything for his services; we paid for the use of the ways and the labor did — the men that we used in hauling the boat out.

Q. If I understand you, you paid him nothing for personal services, but simply so much to the dock company?

A. Yes, sir; for the use of the ways.

Q. And Captain Braithwait acted as agent for the dock company?

A. He was acting, but I don't know whether he was agent or not. He was employed by the company as builder, and I made an agreement with him by which he took charge of my boat while I was gone—to take my place and pull the boat out on the ways.

Q. For these services you paid him only your dock fees or ways fees?

A. I do not recollect whether he was paid anything for that or not; I don't think he was.

Q. You were speaking of the cost of the repairs on the Col. McLeod in the winter of 1879, as compared with what it would have cost to repair her in 1878?

A. Yes, sir.

Q. Would it not have cost more to have put in 70 timbers than 40?

A. Yes, sir.

153 Q. In the same ratio?

A. Yes, sir; it would cost more, but from the amount of damage that Mr. Bagley said was done to the boat I think that the cost of repairing her at that time and the time we did repair her would not differ very much in the cost.

Q. You heard him testify as to the amount of planking she would require?

A. Yes, sir.

Q. Did you use as much as 3,000 feet to repair her where you repaired her?

A. I don't recollect the amount.

Q. You heard his testimony?

A. Yes, sir.

Q. How much did you use in repairing her in the spring of 1879?

A. I don't think we used that much.

Q. How much did you use?

A. About 1,500 feet, I think.

Q. Do you think that it would be safe to put a boat in the water

in the spring that had been in that condition the summer before without recaulking?

A. I think it would not. A boat setting out all winter would dry out so as to need recaulking and repairing.

Q. Then she would have to be caulked all over?

A. Yes, sir.

Q. Then, taking into consideration the difference between the amount of plank required, in the one instance 1,500 feet and in the other 3,000 feet, it would cost, so far as that is concerned, double, would it not?

A. I do not think it would. I do not think the difference in cost would be very much.

154 Q. You have the same amount of work and the same amount of expenses, and the only difference would be in the cost of the materials?

A. It could not be a great deal of difference in the cost of it.

Q. About the condition of the Col. McLeod at the time it made its last trip up to Cow Island, did she not violate her insurance by running in the condition she was in?

A. I don't think she was in such condition as to violate her insurance by running.

Q. When she started on a new trip in that condition did she not violate her insurance?

A. I think not.

Q. Did she not run in violation of the navigation laws of the United States?

A. Not according to my understanding she did not.

Q. When a boat leaves a port where she could repair with broken timbers and bulkheads in her on a new trip is not that a violation of the law?

A. I think not.

Q. Is not that violation of the insurance policy?

A. I do not think it is; I think that is left altogether with the judgment, according to my understanding of the laws governing such things, of the man that is in charge of—managing—the boat, the captain, engineer, carpenter, and so on. If they are running a boat and she is damaged and they think they can repair this damage so that she is safe to go and do work that is required of her I think it is their privilege to do it. That is my understanding about it.

155 Q. Do the underwriters permit a boat to leave in that condition?

A. When the underwriters inspect a boat, which they can do, and find that you are working with a boat that is not seaworthy they can compel you to go and repair her—that is, if you want risks taken on your boat.

Q. If there are risks on your boat on cargo?

A. Yes, sir; it is a policy. I do not understand that you have to do it if you consider that you can repair your boat and start her in working order—in a condition to work with.

Q. She was a passenger boat?

A. Yes, sir.

Q. You are bound by the navigation laws in carrying passengers?

A. Yes, sir.

Q. Do you think under the navigation laws that was a safe boat to leave port with?

A. I would think so. Her officers considered her so.

Q. Assuming that their judgment was correct?

A. Yes, sir.

Q. You are asked as to your judgment. In your judgment was it safe to go up in that condition?

A. I don't know about the condition from my own knowledge.

Q. From the testimony of Mr. Bagley, assuming that to be true, was it in a safe condition to leave port?

A. I would not think she was in as safe condition as she could be made.

Q. Was she in safe condition to leave her?

A. I would say she was not in as good a condition as she
156 could have been put by putting her on the docks, but as they went with her in that condition and she proved able to do the work they did do with her I would consider her in a safe condition to do that work, because we accomplished it.

Q. Men light fires with kerosene oil, but do you consider it safe to do so?

A. I would not consider it safe all the time. There might be an accident.

Q. Was that boat, in your judgment, in safe condition to leave port?

A. I could not answer that, because I do not know.

Q. Assuming the testimony of Mr. Bagley to be correct, was she in safe condition?

A. Under the circumstances——

Q. Circumstances do not change her condition.

A. That is all that I know about it.

Q. Take the condition of the boat just as he testified it to be, was she in safe condition to leave port?

A. Yes, sir; I would pronounce her in safe condition, and I say so because she accomplished it in safety.

Q. Do you believe that any inspector of the underwriters would have permitted that boat to have left port in that condition?

Objected to by plaintiffs' counsel as wholly immaterial, irrelevant, and not cross-examination.

A. I don't know. I don't think they would under some circumstances.

Q. Do you think that the inspector of the board of underwriters would have permitted that boat to leave port in the condition she then was?

A. I think he would under those circumstances.

157 Q. What circumstances do you refer to?

A. The compulsion of the work to be done, and the boat in condition that they thought her safe to go in—the officers of the boat.

Q. Are boats worth as much after they have been injured, as this boat was, as they are before?

A. No, sir; I don't think they are. It don't increase their value.

Q. Does it not deteriorate the value of a boat always to be injured?

A. Yes, sir; some.

Q. What do you think the Col. McLeod could have been sold for in Bismarck in the fall of 1879?

A. I don't know what she would have brought. I have no idea. If put up at public sale she probably would not have brought what Mr. Baker would have estimated her to be worth to him. If he had been compelled to have sold that boat she might not have brought what he considered her to be worth.

Q. What do you think she would have brought?

A. I do not know; she might have brought ten thousand dollars or probably only 4, 5, or 6 thousand dollars.

Q. Do you think she could have sold to exceed 10,000 dollars at that time?

Objected to by plaintiff's counsel because the question comes short of the estimation that the measure of damages would be what that vessel could be sold at. The correct rule would be the value of the boat to them at the time she was sunk.

158 A. I was part owner in her, and if I wanted to sell I would not have taken for my interest at the rate of less than $15,000 for the boat. We had use for the boat, and she answered our purpose very well, and we could not have replaced her for less than that.

Q. How did this boat compare with the Eclipse?

A. I don't know; I think she was a better boat for the trade and she was built — than the Eclipse was.

Q. Did not the Eclipse cost as much as the Col. McLeod?

A. I don't remember what she cost.

Q. Would it not cost as much to build a boat like the Eclipse as like the Col. McLeod?

A. I think it cost as much to build the Eclipse as the McLeod; probably more.

Q. Do you know what the Eclipse sold for?

A. No, sir.

Q. Do you know she was sold for $8,000?

A. I don't know; I heard she was sold the next spring. There are steamboats that cost a great deal of money that if I had to buy them to use I would not have at first cost, when other boats that would cost less would do more service.

Q. Had the Col. McLeod made any money for the owners in the year 1879?

A. She did not lose any.

Q. Did she make any?

A. Yes, sir.

Q. How much?

A. I don't know that.

Q. You are one of the owners, are you not?

A. Yes, sir; our business has not been settled up concerning the Col. McLeod between Mr. Baker and myself.

Q. You don't know anything about her earnings that year?

A. No, sir; but my understanding with him is that she made money.

159 Redirect examination by Mr. DAVIDSON:

Q. What other boats were there the winter you superintended the repairs on the Col. McLeod on those same ways?

A. There were two or three others; there was the Gen. Sherman and the Benton.

Q. And the Eclipse?

A. No, sir; I don't recollect. I don't think the Eclipse was out. I think there were 3 or 4 boats on the ways that winter, but I don't know. The McLeod, Gen. Sherman, and Benton, that I know of, and I think there was another; there were either 3 or 4 there that winter.

Q. Then your contract was a verbal one with the ways company, or whoever represented your interests?

A. So far as my part of the business went it was made with Capt. Braithwait, who was building the ways at the time that we came there and laid the boat up. We expected to pull her out as soon as the ways were so we could, and I made arrangements with Mr. Braithwait to act in my place in managing the boat and pulling her out. The understanding was that we were to pull the boat out on the ways. We were to pay our own labor and pay so much for the use of the ways there that winter—for the boats to lay out on. He pulled the boat out in my place, and when we repaired the boat I superintended the repairs myself.

Q. Paying all the laborers and paying the ways company so much for the use of the ways?

A. Yes, sir; for hauling it out and for laying there during the winter.

160 Q. Were there men with other boats representing the owners of each boat there that winter, in charge of each boat, and looking after its repairs and caring for it?

A. I cannot say as to that.

Q. I mean when you were there.

A. Yes, sir. Each man was there attending to his own work or the boat repairing there just the same as I was.

Q. Mr. Braithwaith then took your place in reference to the Col. McLeod as representing the owners, and you directed him what should be done in your absence in the way of getting her out and blocking her up and putting her in proper condition for repairs?

A. Yes, sir. He was acting for the ways company at the same time in building the ways.

Q. In that respect he represented the owners of the ways?

A. Yes, sir. When I made the arrangement or agreement with him to act in my place in pulling out the McLeod he was acting as

superintendent or manager or agent or builder for the ways company.

Q. In that arrangement did that ways company assume any responsibility in reference to the boat in case she was lost by fire or any casualty that might happen to her during the time she was being hauled out and while in the ways?

A. No, sir; I do not think they did; at least they paid no attention to it while the boat was out, only to collect their tonnage for the use of their ways in the spring.

Q. You knew of no other ways being constructed there except those that were constructed under Mr. Braithwaith's supervision, did you?

161 A. No, sir; not at that time.

Recross-examination by Mr. WILSON:

Q. Who did the shoring to secure the vessel on the ways that winter?

A. My carpenter and myself.

Q. Were you there when she was hauled out?

A. No, sir; she was first hauled out on the ways and fastened there by Mr. Braithwait, the man with whom I had made the arrangement to haul the boat out for me, and when I wanted to repair it I took my carpenter and went there and raised the boat and blocked her up and repaired her.

Q. What were you to pay Mr. Braithwait for taking charge of her?

Objected to by plaintiffs' counsel as being immaterial and not proper cross-examination.

A. I did not agree with him to pay him anything. There was no understanding about what his fees would be; I merely asked him to act in my place—in the management of my boat for me in my absence in pulling her out when he got the ways finished.

Q. You have had boats pulled out before when you were captain of them?

A. Boats have been pulled out that I was interested it.

Q. What did you have to do as captain when those boats were pulled out; did you have anything to do?

A. No, sir.

Q. Then you did not get Mr. Braithwait to do anything for you, did you?

A. I told him when he got the ways completed I wished
162 him to take charge of the McLeod and pull her out on the ways for me, and he said he would do so.

Q. And you agreed to pay him?

A. So much for the use of the ways

Q. You made that agreement there at the same time?

A. Yes, sir; it was the understanding that the boat was to pay for the use of the ways at the rate of so much tonnage.

Q. And the ways company was to haul her out on these ways?

A. Mr. Braithwait was to superintend it for me.

Q. He was the agent of the ways company, was he?

A. I don't know; he was building the ways at the time.

Q. How did you come to make an agreement with him if he was not agent for the ways company?

A. I did not make any contract for the use of the ways.

Q. I thought you agreed to pay so much tonnage?

A. That was the arrangement made for the use of the tonnage. There was no understanding between Mr. Braithwait and me concerning it, only that we were to pay for the use of the ways for the boat to go on. It was my understanding, however—I don't know from what source or from whom—that the boat had to pay so much tonnage, and when the ways were ready Mr. Braithwait was to superintend and manage the boat for me in my absence, pulling her out when he got the ways finished.

Q. And it was because he had charge of the ways company that you made this agreement with him, was it not?

A. It was because he was superintending the building of ways.

Q. Who made the agreement as to the amount that should
163 be paid for the use of the ways?

A. I don't know.

Q. You did not do it?

A. No, sir. In the spring, when we all settled up for the use of the ways, they charged so much tonnage for the use of the ways.

Q. Who did you settle up with?

A. I believe that the bill was settled with a man by the name of—Mr. Weaver's brother-in-law, anyway; I don't recollect his name.

Q. Mr. Call—is that his name?

A. It was Mr. Weaver's brother-in-law, who was in the lumber business there. I think it was paid at Mr. Childs' bank there, though I did not look after it. Our clerk settled the bill.

Q. In all cases where your boats have been pulled out you have always had the ways company take charge of the boat?

A. I believe that is the customary way of doing.

Q. And this case at Bismarck you have — testifying to is the only exception to that rule?

A. I don't know.

Q. In your experience, I mean?

A. Yes, sir; in my experience. I had no experience that I know of in pulling boats out, but I have been interested in boats to be pulled out. It has always been attended to by some other party managing the business affairs of the boat.

Q. When you went there in the spring who had charge of those ways—Capt. Braithwait?

A. I do not think any one had.

164 Q. You were not there in the winter?

A. No, sir; not after the boat ways were finished.

Redirect examination by Mr. DAVIDSON:

Q. When you speak of the ways company do you know whether there was any corporation then managing those ways or not?

A. I do not know.

Q. As a matter of fact, did not the owners of the various steamboats having occasion to haul out their boats at Bismarck contribute each so much towards the expense of laying down the ways and then put somebody in charge of them to haul out boats and then each boat manage its own hauling out and its own repairs, so far as you had any knowledge of the ways?

Objected to by defendants' counsel.

A. It was my understanding that it was managed in that way—that is, owners of the boats contributing so much money, taking out, as they claimed, stock at so much a share, and set this man Braithwait to work to get them up those ways. After he finished them they were used in that way, each boat apparently doing its own work in pulling the boat out.

Q. When you speak of its being the usual custom when boats are hauled out to make a contract with the ways or dock company and turn the boat over to such company and let them have the sole charge, you speak of places where there are regular steamboat ways or dry-docks and a company that is responsible appointed that managed it and controls it and takes in charge the vessel under the contract until she is repaired and put back into the river?

165 A. That is my understanding of the way it is managed.

Q. Those ways differ from ordinary ways and dry-docks, do they not, in the fact that they are simply improvised out of the necessity of the business in order to take care of boats and get them out of the river and enable them to make repairs without going clear up to Yankton or Sioux City or some other place where there were proper ways and docks?

A. Yes, sir; that is my understanding as to what they were intended for.

Q. Capt. Braithwait was an old steamboat man on the Upper Missouri river and an acquaintance of yours, was he not?

A. Yes, sir.

Q. This matter of his managing, taking charge of, your boat in your absence and pulling her out for you was not out of the usual course of acts of courtesy between steamboat men, was it?

A. I think not. I asked him to do so on account of wishing to leave before the ways were finished.

Q. You paid all the labor; you never asked him to make any disbursements for you in any way?

A. No, sir; I was to pay the labor. The boat was to be pulled out at my cost.

Q. You don't know whether he has ever received any compensation for that friendly courtesy—for taking care of your boat?

A. I don't know that he has. I never paid him anything myself.

Q. You don't know whether he continued in the employment and pay of whoever paid for the construction of the ways after they were finished, do you?

166 A. No, sir; he did not appear to have anything to do with them when I went there to repair the boat.

Q. Who did seem to have charge of them?

A. There did not appear to be any one in charge of them.

Q. There were 4 boats there, you say, to be repaired. Who was running the repairs on each boat and taking care of them?

A. The managers or owners of the boats. The mates and captains generally superintended it and employed their hands to work at it?

Q. When the repairs were completed and the boats were ready to be put back into the river—who did that?

A. The man who was managing it—the captain of the boat or the mate.

Q. And he employed his own labor?

A. Yes, sir.

Recross-examination by Mr. WILSON:

Q. Who built and paid for those ways, do you know?

A. No, sir; nothing more than just from hearsay.

Q. Who owned those ways in the fall of 1879, do you know?

A. No, sir; I don't know that; never did know.

Q. Who paid for putting those ways there, do you know, Captain?

A. No, sir.

Q. Who paid for any part of them, Capt., or do you know?

A. Only from hearsay. I did hear that Mr. Baker and Mr. Powers had an interest in them.

Mr. WILSON: I do not care what you heard; that is not what I asked.

167 I. G. BAKER, of lawful age, being produced, sworn, and examined on the part of the plaintiffs, deposeth and says:

Direct examination by Mr. DAVIDSON:

Q. What is your name, age, residence, and occupation?

A. I. G. Baker; age, 62; residence, at St. Louis.

Q. You are one of the owners of the steamer Col. McLeod and one of the libellants in this suit?

A. Yes, sir.

Q. How long have you been interested in steamboats as part owner or owner?

A. I believe since 1874 or 1875; 1875, I think, my first interest.

Q. How many steamboats do you own an interest in or have owned an interest in during that time?

A. In three boats.

Q. Have you any familiarity with the Upper Missouri river steamboating trade and the steamboats that are used up there?

A. Yes, sir; I have a general knowledge—not a full knowledge of it, I might say.

Q. For whom was this steamer Col. McLeod built?

A. ⅔ for I. G. Baker and Co. and one-third for Capt. John Massey.

Q. Was she built by her owners?

A. She was built by her owners, sir; no change in ownership.

Q. Did you see her after she was engaged in the Upper Missouri river trade after she had reached Bismarck, in 1878?

168 A. Yes, sir; I saw her and travelled on her; saw her several times during the season of 1878.

Q. Did you see her and travel on her in 1879?

A. No, sir; I did not.

Q. Do you mean you did not see her or did not travel on her?

A. I did not see her in 1879; I was not on the river that year; oh, yes, sir; I did see her in 1879; I loaded her for the trip she made to Cow Island.

Q. How was she fitted and adapted for that business for which she was designed between Bismarck and Ft. Benton?

A. She was as perfectly fitted as a small boat could be; her power and hull were all made under the supervision of Mr. Adkins—everything new from bottom to top and all the very best appliances that could be had.

Mr. WILSON: You are speaking of the spring of 1879?

WITNESS: I am speaking of when she was built, in the summer of 1878; somewhere in the summer of 1878.

Mr. DAVIDSON:

Q. Did she do her work satisfactorily during the first season, 1878, in that trade?

A. Very; received great credit for the work she did.

Q. About what time in 1879 was it that you went there and had her loaded for this trip to Cow Island?

A. Some time in October; I cannot give the date now.

Q. What were the special reasons for sending her on that trip at that time in the year?

Objected to by defendants' counsel as incompetent and irrelevant.

A. Because we could not get any other boats to carry the freights for us and we had to carry it ourselves, as tonnage was scarce at that time.

169 Q. Were you aboard of her at that time before she went on this trip?

A. Yes, sir.

Q. What was her general condition at that time?

A. I knew nothing but what she was in good insuring shape to go on the trip?

Q. Did you confer with her officers in reference to her being in good condition to send out and make the trip?

A. Yes, sir; I conferred with Captain Murphy, and he said——

Objected to by defendants' counsel to both question and answer.

Q. Do you know who owned and was taking an interest in that freight that was sent up on that trip?

Objected to by defendants' counsel as incompetent and immaterial.

A. I think it was principally our own freight—either contracted freight or that were to be handled by us, and for the delivery of which we were responsible.

Q. By the firm of I. G. Baker & Co.?

A. Yes, sir.

Q. After satisfying yourself as to the condition and fitness for the trip you caused her to be loaded?

A. Yes, sir.

Q. Were you there when she returned from that trip?

A. No, sir.

Q. Did you hear the testimony of Mr. Bagley yesterday detailing the condition she was in when she returned to Bismarck about the middle of November, after the trip to Cow Island?

A. I did.

Q. Taking his statement to be true as to her condition and the knowledge you had from personally seeing her before she
170 started upon the trip, and supposing that she received no injuries on this trip to Cow Island, in your judgment, what was the reasonable and fair value of the Col. McLeod at Bismarck after she had returned from that trip on or about the 17th day of November, 1879?

Objected to by defendants' counsel as incompetent, irrelevant, and immaterial. Secondly, that the witness has not shown himself competent to testify upon that point as an expert or to give an opinion. Third, on the grounds that the question calls for a supposition.

A. She was worth $14,000 at that time.

Q. Did you make any contract or did you know of any of the other owners making any contracts with C. S. Weaver and Co. to haul the Col. McLeod out on the ways at Bismarck after her return from that trip? State what the facts are, giving your knowledge.

A. Neither myself nor any of my partners made any contracts with C. S. Weaver and Co. that I know of. I know that I did not.

Q. Have you ever seen or known of any contract in writing being made with C. S. Weaver and Co.?

A. No, sir; I have not.

Q. To the answer of the respondents there were certain questions propounded to be answered by the libellants under oath. One of these questions, numbered "Interrogatory 1st," read as follows: "Did you not contract and agree with C. S. Weaver and Co. to haul out upon their ways at Bismarck the steamer Col. McLeod and keep her there upon said ways until the following spring?
171 If said contract was in writing we require that you annex to the answer a true copy of said contract." I believe you verified under oath the answers to the interrogatories, and to this one you answered, "There was a verbal agreement with C. S. Weaver & Co. to haul the steamer Col. McLeod out on the ways; I don't know of any other contract." Will you now state upon what facts you based that answer?

Objected to by defendants' counsel as incompetent—intended to contradict their own answer under oath.

A. I instructed the Capt., by letter, to have her hauled out on the ways, and when I saw him on his return he told me——

Objected to by defendants' counsel as not competent testimony.

Witness continued: That he had notified Mr. Weaver to have the Col. McLeod hauled out on the ways, and of course he had dropped her down there for that purpose—where she was moored at the time she was sunk.

Q. Then you had no personal knowledge of it—only as it was represented to you by the master?

A. That is all.

Q. If there was any such contract made have you any knowledge of what the details of the contract was, personally; do you know of your own knowledge?

Objected to by defendants' counsel as incompetent.

A. My memory is——

Q. Do you know, of your own knowledge, what the details
172 of that contract was, if such contract was ever made?

A. No, sir; I don't know what the details of it was.

Q. Who was the managing man of the firm, to give directions as to what should be done to the boat and where she should be laid up?

A. I was.

Q. After the boat had met with the accident that caused her to sink what did you do in the way of trying to secure marine pumps and proper appliances to wreck her or to save her?

A. I applied to the agent of the underwriters here and got the only pump I could find in the city and shipped it forward to Bismarck, and as soon as we could get a diver from somewhere above Memphis I sent him forward to patch the bottom.

Q. What further did you do after sending forward the diver and the marine pump for her?

A. After many days' delay the pump and the diver got there, and — serious delays from the weather that was annoying them they got into position and made an effort with their pumps to raise her and failed, and then it was advised to get a more powerful pump, and I found such a one at La Crosse. As soon as I could I corresponded with a party there and had him ship that pump to Bismarck. I also sent another diver with that pump.

Q. You did not go there personally, did you?

A. No, sir.

Q. Who was there representing the owners of the boat in the efforts to save her?

A. Capt. Paul Murphy.

173 Q. Can you state how much was expended by the owners in their efforts to raise and take care of this property and rescue all of it that could be rescued from the wreck?

Objected to by defendants' counsel as incompetent.

A. Yes, sir.

Q. Please state it.

A. We expended $4,333.55.

Q. Can you state what the proceeds were of such portions of the wreck as were rescued and sold, what it amounted to—gross receipts in the way of salvage from the wreck?

A. $1,093.00.

Q. Was that all the proceeds of the pieces of machinery, furniture, and tackling, and everything that was rescued from the wreck?

A. It was all we ever got the benefit of the sale of. There may have been a few pieces stolen that we never got pay for.

Q. What became of the wreck, so far as you know?

A. The cabin furniture was taken to Ft. Benton and sold. The boilers, gas pipe, and copper pipe and some few lines were brought here and sold. The hog chains were brought there by some steamboat men at Bismarck.

Q. The hull, engines, etc.—what became of them?

A. It lies in the bottom of the river.

Q. Never has been rescued?

A. No, sir.

Q. Do you know of anything more that could have been done
174 under the circumstances than was done to rescue and save that vessel after she sunk?

A. I do not; everything was done that energy and money could do to save her.

Q. Had you any marine insurance to indemnify you against loss in any way?

A. No, sir.

Q. Was there plenty or a scarcity of freights and business for that boat during that last season—1879?

Objected to by defendants' counsel.

A. There was an abundance of freight; in addition to what we freighted of our own goods, we paid for other carriers besides.

Q. Do you mean by that freights that your firm had contracted to deliver?

A. Yes, sir.

Q. You, then, had not tonnage enough of your own to meet the contracts you had for transportation?

A. No, sir.

Q. How was the next season—the year 1880—as to an abundance of freights and business to occupy the boats you had?

A. We tried to protect ourselves and made a contract with another line to carry our surplus of freights for the year 1880, and did so with the Coalson Line.

Q. Can you give us any definite idea as to the amount of freights belonging to your line, and which was contracted by your line to carry in 1879, that you turned over to other parties that your boats could not transport?

175 A. I cannot; I know that there was some lots, but I don't know whether it was one hundred or two hundred or more

tons; I don't know how much, but I am pretty certain it was an entire boat-load over and above our own.

Q. That you turned over to somebody else to carry?

A. Yes, sir.

Q. You say you instructed Capt. Paul Murphy to make arrangements to have her hauled out and kept on the ways and repaired. Did you give him any instructions about staying himself or leaving some one in charge of her?

Objected to by defendants' counsel as incompetent.

A. I instructed him to leave his carpenter on board as watchman.

Q. This carpenter was this Mr. Bagley, who testified here?

A. I did not know the carpenter; I merely know that he had a carpenter, and my object was that I could have a carpenter to help repair her when she was on the ways.

Q. What was your purpose in reference to these repairs, to superintend them yourself or let them out by contract?

Objected to by defendants' counsel as incompetent, irrelevant, and immaterial.

A. She would have been repaired, the same as she had been the year previous, by the Captain.

Q. If you think of any other point that I have omitted that is material to the case you can mention it, and I will question you in reference to it.

A. I don't know of anything, except unless as to her value and being a successful low-water boat, etc.

176 Q. What was the general business of I. G. Baker & Co.?

Objected to by defendants' counsel.

A. Merchants and contractors.

Q. Where did you carry on the business of merchandizing?

A. At Ft. Benton.

Q. And for whom were contracts generally; what class of transportation?

Objected to by defendants' counsel as incompetent, irrelevant, and immaterial.

A. Very largely for the Canadian government and for other departments of the United States and for citizens.

Q. How long has this firm been carrying on business up there—your firm?

Objected to by defendants' counsel as incompetent, irrelevant, and immaterial.

A. Under different names since 1864.

Q. Had you more or less freighting of this kind and contracting to do during the seasons of 1878, 1879, and 1880?

A. Yes, sir; an abundance of it.

Q. This boat was built with special reference to the business of the firm?

Defendants' counsel here entered an objection to all these questions as incompetent, irrelevant, and immaterial.

A. Yes, sir.

Q. For any one else who was carrying on a business of that kind at Ft. Benton or at other points on the Upper Missouri river and who had freights of their own and contracts to carry out,
177 would not this steamer McLeod been just as valuable as to your firm?

Objected to by defendants' counsel as incompetent, irrelevant, and immaterial.

A. She would have been equally valuable to any firm under the same circumstances.

Q. What were her special good qualities from those possessed by other boats generally in the Upper Missouri river?

Objected to by defendants' counsel as incompetent, irrelevant, and immaterial.

A. She was of very light draft, in consequence of which the expenses of repairs were inconsiderable as compared with those of other vessels in which we have been interested at Bismarck, and she had fine speed.

Q. Had you a general knowledge of the cost of steamboat repairs there — previous years at Bismarck?

Objected to by defendants' counsel as incompetent, irrelevant, and immaterial.

A. No, sir; not very much experience as to repairing boats, except the McLeod repairs in the spring of 1879. That was about the first boat we repaired at Bismarck in 1879, the first time the ways were completed. They were built in the fall of 1878.

Q. Do you know the cost of oak lumber suitable for use on the bottom of such a boat as the Col. McLeod here and at Bismarck?

Objected to by defendants' counsel as incompetent.

A. I could not tell the cost of oak lumber delivered at Bismarck. I knew what it would cost here at that date, and about what it would cost to transport it from here there.

178 Q. Do you know about what the cost would be of replacing those broken timbers that Mr. Bagley mentioned?

A. I know from the bill that was paid in replacing forty of them, in 1879, that his estimate was ample to cover the cost.

Q. Then, in your judgment, from previous bills you have paid and statements that he had made, you think the estimate of the cost of repairing the McLeod, if she had not been sunk, was a fair and reasonable one?

A. Yes, sir.

Cross-examination by Mr. WILSON:

Q. You say you saw this boat in 1879?

A. Yes, sir.

Q. State the condition she was in when you saw her.

A. I saw her lying at the landing like any other boat ready to receive freight.

Q. Did you examine her to see what her condition was?

A. I did not have any occasion to examine her. I was not requested to examine her.

Q. Did you examine her?

A. I did not.

Q. You made no examination of the boat at all?

A. Not of her bottom.

Q. Any part of the boat?

A. I was on the boat, but did not examine it any more than to casually walk over the boat.

Q. You knew nothing about the condition of her hull, in 1879, when she started on the trip?

179 A. I know she laid there at the bank without being considered unseaworthy.

Q. You don't know anything about her real condition?

A. I know she was in good, seaworthy condition.

Q. How did you know it?

A. Because I saw the freight in her and saw her start on that trip.

Q. Did you examine her hull?

A. No, sir.

Q. You knew nothing about the condition of her hull?

A. I did not.

Q. You say that you could not get another boat to take her freight; was that from the demand of the boats, or the lateness of the season?

A. It was at the season of the year that was considered late steamboating, and most of the boats, or a portion of them, were being laid up; then, additionally, other boats at Bismarck had all the work they could do.

Q. What do you mean by "insuring condition?" You say the boat was in good insuring condition.

A. I understand by that if the boat is in bad condition and the freight in her hull could not be insured it would be the duty of her officers to report her not in insurable condition to carry freight.

Q. You stated in your direct testimony that she was in insurable condition?

A. Yes, sir.

Q. Now you state you did not examine her hull and don't know anything about it?

A. I did.

Q. Then your testimony that she was in good insurable condition was based on testimony of other parties—hearsay?

180 A. It is based on the fact that she made the trip with insurance taken on her cargo.

Q. Did the insurance company know anything about her condition at that time?

A. No one, to my knowledge, had reported her as being unsound or unsafe.

Q. Had any one reported the actual condition she was in, that you know of?

A. There had not been any reports of her being in an unsafe condition, either good or bad.

Q. There had been no reports as to her condition?

A. No, sir.

Q. From anybody?

A. Not from any one that I know of.

Q. What was the value of the cargo she took up on her last trip to Cow Island?

Objected to by plaintiffs' counsel as being immaterial, incompetent, and not proper cross-examination.

A. I could not tell that without seeing what she was insured for, but I imagine it was worth from four to eight thousand dollars.

Q. The value of the freight she took up at that time?

A. Yes, sir.

Q. The full value of the cargo?

A. Yes, sir; I imagine that to be the value of all the cargo. It is difficult to tell. It may have been worth a good deal more. It would have been worth $20,000, upon reflection.

Q. Who did the most of that freight belong to?

A. Largely to our firm, I think.

181 Q. It was very important that that freight be got up there that fall, was it not?

A. Yes, sir; it was important that it be got up.

Q. You had no means of getting it up there, except by using the McLeod for that purpose, had you?

A. No, sir.

Q. If you had stopped to repair her it would have been too late to have got it up?

A. Yes, sir.

Q. You were compelled to let the freight stay there at Bismarck during the winter or send the boat up in the condition it then was?

A. Yes, sir.

Q. That was the reason for sending her out on that occasion, was it?

A. Yes, sir; that was the reason.

Q. How did you fix the value on that boat at $14,000, as you say?

A. She cost us the year before nearly $15,000. It is worth from one to two thousand dollars to have a boat winter at Bismarck more than it would be worth here.

Q. Why is it worth more to have a boat wintered there than here?

A. Because she is there in readiness to make an early trip to Ft. Benton in the spring when freights are worth more.

Q. Does that add to the value of a boat?

A. Yes, sir.

Q. Did steamboats cost any more in 1879 than when this boat was built?

A. I don't think there had been any advance to speak of in 1879.

182 Q. Had there not been a falling off in the value of steamboat property?

A. No, sir; not that I know of.

Q. Is it not true that in the fall of 1879 steamboat property was very cheap indeed—steamboats could be bought at a very low price?

A. No, sir; I did not understand it so.

Q. Do you swear it is not the fact?

A. I would swear that I do not believe such to be the fact.

Q. How much less is a steamboat worth at the end of the year after a year's service than she is at the beginning of the year, under ordinary circumstances?

A. In the first years of a boat's life I don't know as there is any depreciation if she is kept in good repair.

Q. Do you mean to say that a boat two years old would bring the same price as a new one?

A. I think so.

Q. You wish that to go down in your testimony—that she is worth as much at the end of two years as she was when new?

A. Yes, sir; if kept in perfect repair.

Q. At what age does a boat begin to depreciate in value?

A. I should judge the beginning, of course, is when they begin to let her repairs fail.

Q. I am talking now with reference to her age if she is kept in repair?

A. She would begin, usually, to depreciate at the age of 5 or 6 years.

Q. Do you mean to say that is when she first begins to

183 depreciate?

A. There might be a slight depreciation at a year old and a very slight one at two years old.

Q. What is the average life of a steamboat, suppose she wears out in the service?

A. I think they live about 15 years up in that dry climate.

Q. Then at the end of 15 years the whole cost of the steamboat would be wasted away, would it not?

A. I think so.

Q. That makes the depreciation how much per cent. each year?

A. As a boat gets old it becomes more every year. After five or six years it takes more to keep it in trim.

Q. The nearer she gets to five or six years old the less valuable she is?

A. Of course, at four years old she is less valuable than she would be at a year old.

Q. Do you give it as your testimony that a boat that has seen two years' full service would be worth as much as an entirely new boat?

A. No, sir; I do not think it would be worth just as much.

Q. How much less?

A. If the boat was adapted and suited the owners——

Q. My question is how much less.

A. Under some circumstances it would not reduce it and under other circumstances it might reduce it a good deal.

Q. Then you mean to say that under some circumstances a boat is worth as much at the end of two years' service as when she is new?

184 A. Yes, sir.

Q. You speak now as to the intrinsic value of the boat?

A. The intrinsic value of the steamboat if kept in repair.

Q. Her market value?

A. Yes, sir; her market value.

Q. You say she cost nearly $15,000. What do you include in that—the furniture and all?

A. The furniture and rigging.

Q. You instructed Capt. Murphy to instruct them to have this boat hauled out?

A. I instructed him to see her hauled out before he left there.

Q. Have you a copy of that letter?

A. Yes, sir; I have in my letter book.

Q. The impress taken from the original letter?

A. Yes, sir.

Mr. WILSON: Mr. Davidson, will you produce a copy of that letter and have it attached as an exhibit to this deposition?

Mr. DAVIDSON: Yes, sir.

(Copy of letter hereto attached and marked Exhibit "A.")

Mr. WILSON:

Q. Was there more than one copy of that letter kept?

A. No, sir.

Q. He afterwards informed you that he had made arrangements as directed?

A. No, sir; the letter got there about the time the boat sunk, I suppose, from the date of it. He told me here afterwards

185 that he had made his arrangements with Mr. Weaver to have her hauled out.

Q. Any contract that he made with Messrs. Weaver and Company in regard to this boat was by authority, was it, Capt.?

A. Yes, sir.

Q. With the sanction and approval of the owners?

A. Yes, sir.

Q. He had authority to bind the owners of the boat?

A. No, sir; no special authority to bind the owners of the boat any more than any other steamboat men could do.

Q. Were there any telegrams sent to Capt. Murphy in relation to having this boat taken out?

A. I don't think there was any; I don't remember any.

Q. Did you give Capt. Murphy any verbal instructions while you were there at any time?

A. While I was there, in the fall of 1879, we had a conversation about it, that as soon as the boat was repaired it was to be hauled out; I do not remember anything that was said, only in a general way.

Q. Did you have any conversation with Messrs. Weaver and Co. or any one representing them?

A. No, sir; I did not, to my recollection.

Q. All the agreement or arrangement that was ever made in relation to hauling out the boat in the fall of 1879 was made by Capt. Murphy?

A. It was, so far as I know; I know of no other.

Q. Who composed the firm of I. G. Baker and Co.?

A. I. G. Baker, William G. Conrad, and Charles E. Conrad.

Q. In the summer of 1879 was there not a great deal of
186 competition for the summer's freight of 1879, in the spring and summer, when the contracts were made?

A. Yes, sir; I think there is always a good deal of competition for freights.

Q. Were not freight rates very low that year?

A. Yes, sir. I think they were about as low as any season we have had.

Q. Is it not true that boats on that run, on the Upper Missouri, the McLeod included, that their business was not a profitable business that year?

A. I think so. It was mostly a losing business with most of them.

Q. Had you made any contracts for freights for 1880 at that time?

WITNESS: At the time she was sunk?

Mr. WILSON: Yes, sir.

A. No, sir; I think not.

Q. Who went with the pump that was sent from St. Louis to raise this boat?

A. It was about the time that a man, a marine diver, by the name of Nash went. I don't know whether they went the same day or not.

Q. Was any sent in charge of the pump to expedite its being got through there?

A. No, sir; no one sent along to accompany it.

Q. Were not your instructions to Capt. Murphy to arrange with Messrs. Weaver and Co. with regard to hauling out this boat for the winter?

A. I think that was the meaning of the letter that I wrote him and which I have produced.

Q. You say that no one was sent with this pump to see to getting it up there?

187 A. Yes, sir.

Q. Was it a very small pump?

A. I think it was a 4-inch pump; a 4-inch siphon pump, I think they called it. They considered it a very powerful pump.

Q. Could this La Crosse pump be obtained in that time, do you know?

A. I presume it could if I had known this other one would not have answered.

Q. You stated that you expended $4,300 endeavoring to raise the Col. McLeod. I want you to state the items of that expenditure, if you please.

A. I can get the items. It was money paid for those divers and their expenses coming and going and the labor and lumber used at Bismarck altogether made that amount.

Q. Do you know how much it cost to send this pump from St. Louis up there to make the attempt with it? How much was expended in that first attempt to raise her with that St. Louis pump?

A. No, sir; I don't know what portion of it. I think the first attempt cost us about one half the expenses. There was a great deal of labor cutting the ice away every time an attempt was made.

Q. Do you wish to be understood as testifying that this $4,300.00 was expended after the 17th of November, after the accident happened?

A. Yes, sir.

Q. And solely in attempts to raise the boat?

A. Yes, sir.

Q. Can you furnish a bill of items just how that money was expended?

188 A. No, sir; I cannot furnish a full account of every item, but I can furnish a statement of Mr. Murphy's drafts that he drew on us. I could not give you the items, because I did not keep a correct account of many of the expenses.

Q. Did you have any other boat at Bismarck at that time?

A. No, sir.

Q. What became of the Red Cloud?

A. She was brought here to St. Louis.

Q. The Red Cloud was a boat employed by you in the Upper Missouri river business?

A. Yes, sir.

Q. If it was worth so much more to have a boat there in the spring why was the Red Cloud brought out?

A. She is a passenger boat and has fine upper accommodations for light freights, and between passengers and light freights we could ship on her from here. We found we could always make one paying trip from here.

Q. How was the Col. McLeod in that respect?

A. She was intended more as a freight boat than a passenger boat. The Red Cloud was a much heavier and deeper boat and could not go to Fort Benton in the early season, when the Col. McLeod would go up near the head of the river.

Q. Will you furnish a bill of the items as nearly as you can as to what this $4,300 was expended for to attach to your testimony?

A. I will furnish the drafts that were paid by Capt. Murphy and the expenses as near as I can; yes, sir.

Statement of expenditures marked Exhibit "B" and hereto attached.

189 Q. I want you to state what articles were saved from the Col. McLeod.

A. The cabin furniture, our boilers, our pipes, chains, and our rigging; some of it, a portion of it.

Q. Do you know how much her cabin furniture cost, Captain?

A. No, sir; I don't remember how much.
Q. Can you approximate the amount?

Objected to by plaintiffs' counsel as being immaterial and not proper cross-examination.

Q. Can you approximate it, Captain?
A. I don't think I could. I don't know what it cost. I presume five or six hundred dollars.
Q. It was all saved?
A. I don't know whether it was all saved.
Q. So far as you know it was all saved?
A. Yes, sir; I don't know as it was lost.
Q. Her boilers were in just as good condition or nearly as if they were new, were they not?
A. I think so.
Q. They never had been injured in any way?
A. I think not.
Q. They were saved?
A. Yes, sir.
Q. They were worth nearly all what they cost?
A. I don't know what they rate second-hand boilers at.
Q. They do not deteriorate as fast as the steamboat does, do they, Captain?
A. Second-hand boilers are very difficult property to sell.
190 You have to find a purchaser that wants just such a sized boiler.
Q. They were worth comparatively just as much when compared with new ones as the boat was?
A. No, sir; they were not—not separate from the boat.
Q. You think they were not?
A. I know they were not.
Q. They did not deteriorate in value any more than the balance of the boat?
A. No, sir.
Q. They were saved in perfect condition?
A. Yes, sir; except when they chopped them off from the stand pipes to get them out.
Q. That did not affect the boiler any?
A. Not much.
Q. Do you know what these boilers cost when new?
A. No, sir.
Q. About?
A. The contract in building was for boilers and engines and all the machinery complete. I know what the entire bill was, but I don't know how they valued the boilers.
Q. How large was those boilers?
A. I cannot tell you. I don't remember the dimensions.
Q. Was there anything besides the cabin furniture and the boilers and the chains you have testified to that were saved?
A. Not that I remember.
Q. To whom were the boilers sold?

A. They were sold to P. P. Maniva, a junk dealer on the levee.
Q. To whom was the cabin furniture sold?
A. It was shipped to Fort Benton and sold there.
191 Q. To whom?
A. I don't know; to different parties.
Q. Was this boat insured?
A. She had a fire policy.
Q. Did she have a marine policy?
A. Yes, sir.
Q. Up to what time?
A. From the time she went into the service she had a marine policy. I am not certain about that, but I think so.
Q. Do you know when the last marine policy on her expired?
A. No, sir.
Q. Can you state approximately?
A. No, sir; I don't know whether it was taken for the year or for six months.
Q. Was there any more than one policy on her?
A. No, sir.
Q. She had no policy for 1879 at all, then?
A. No, sir.
Q. Was there any reason why she was not insured for 1879?
A. Our reason was that she was running on that upper river where there are very few snags and it was useless to pay that much premium on that safe part of the river.
Q. She was inspected for insurance that year?
A. I think she was. I know she was.
Q. For 1879?
A. Yes, sir.
Q. Was she inspected by Capt. Adkins?
A. Yes, sir.
Q. Was the rate of insurance any higher on the second
192 year than the first?
A. No, sir; it was at the same rate.
Q. She was classed the same for insurance the second year as the first?
A. Yes, sir.
Q. You are sure of that, are you?
A. Yes, sir.
Q. Do you know how many timbers were put in this boat in 1878?
A. I know there were 40 timbers shipped up to be put in her.
Q. From here?
A. Yes, sir; either 40 or 44; I am not certain about that.
Q. Do you know what these timbers cost here now?
A. The timbers and the lumber—I think whole timber bill was $65, purchased here for her.
Q. Were the timbers bought and prepared here?
A. Yes, sir; they were parts of timbers.
Q. Do you mean to say that you got 40 whole timbers for that amount?

A. Yes, sir.
Q. Forty full-length timbers?
A. Yes, sir.
Q. You don't know how many were put into the boat?
A. I do not.

Cross-examination by Mr. DAVIDSON:

Q. Are you positive about that bill of $65 covering the timbers as well as the oak plank that were put in her bottom?
193 A. That is to the best of my recollection; it covers both the timbers and the oak plank—the whole lumber bill.
Q. That you sent up there?
A. Yes, sir.
Q. Is Capt. Paul Murphy now in the employ of I. G. Baker & Co.?
A. No, sir.
Q. When did he leave their employ?
A. At the close of the last efforts to raise the boat; probably early in March of 1880.
Q. Do you know where he is now?
A. I do not.
Q. Have you made any efforts to ascertain his whereabouts?
A. I have been inquiring very actively for the past month.
Q. This letter which was referred to in your cross-examination, to Capt. Murphy, does it contain all the instructions that you gave him, so far as you recollect?
A. Yes, sir; some general conversation may have occurred at Bismarck while I was there, in October of 1879, but I do not remember anything definite in it.
Q. Did you have some talk with him about having her taken out of the river?
A. It was understood between us that she was to be taken out as soon as she returned to Bismarck. There was no details entered into.
Q. That was the usual thing to do with boats lying up there after they got the ways established, whether they needed any repairs or not, to take them out to free them from the danger from the ice?
194 A. Yes, sir; any one would prefer to pay for hauling them out; I would, at least.

Recross-examination by Mr. WILSON:

Q. Do you know how much plank was included in that bill that you sent up in the winter?
A. No, sir; I do not.
Q. Was all the material that was used to repair her up there in the spring of 1879 sent from St. Louis?
A. No, sir; I think they bought about $30 worth at Bismarck afterwards of oak plank and a lot of soft lumber besides from Weaver and Co.

Stipulation.

It is stipulated orally before the notary by the libellants' and respondents' proctors that the reading of the evidence of the several witnesses after the short-hand reporter has translated it into long-hand is waived, and the signing of the depositions of the witnesses is hereby waived, and proper written stipulations therefor shall after be signed and filed in court.

PAUL F. COSTE,
Notary Public.

I. G. Baker. C. E. Conrad. W. E. Conrad.

OFFICE OF I. G. BAKER & CO., 219 OLIVE ST.,
ST. LOUIS, *Nov. 10th*, 1879.

Capt. Paul Murphy, str. Col. McLeod, Bismarck, D. T.

195 DEAR SIR: I received a telegram from Mr. Edwards, sent from Buford to-day, and was glad to find the trip had been made and the prospect of your soon being at Bismarck.

I wish you to remain and pull the boat out on the ways and employ the carpenter to stay as a watchman and help repair the boat if he will.

I would be glad for her to be the last boat on, and not be put on first, as *were* last year, if it can be arranged without much detention.

When you get her out have carpenter examine and see what amount and sizes of timber and plank are wanted.

Yours truly, I. G. BAKER.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

Be it known that I took the foregoing depositions pursuant to the annexed stipulations; that I was then and there a notary public within and for such city and State; that I exercised the powers of said office in taking said depositions; that by virtue thereof I was then and there authorized to administer an oath; that each witness before testifying was duly sworn to testify the whole truth and nothing but the truth relative to the cause specified in the annexed stipulation.

Witness my hand and notarial seal January 12th, 1882.

[NOTARIAL SEAL.] PAUL F. COSTE,
Notary Public, City of St. Louis, Mo.

Notary and stenographer's fees, $104.00.
Paid by libellants.

PAUL F. COSTE,
Notary Public.

[Endorsed:] Filed Nov. 22, 1882. Wm. A. Spencer, clerk.

196 District Court of the United States for the District of Minnesota. In Admiralty.

ISAAC G. BAKER *et al.*, Libellants,

vs.

THOMAS C. POWER *et al.*, Respondents.

Present: James H. Davidson, of proctors for libellants, and Henry A. Wilson, of proctors for respondents.

Depositions of Peyton S. Davidson, James Eldridge, and George I. Weeks, taken in behalf of libellants and before the undersigned, by virtue of the respective parties hereto annexed.

Deposition of James Eldridge.

JAMES ELDRIDGE, being first duly sworn, on his oath says:

My name is James Eldridge; my age, 53 years; I reside at La Crosse, Wisconsin; by occupation am a steamboat man and steamboat builder, and have been generally employed about steamboats for about 30 years; at present am employed at Capt. P. S. Davidson's boat yard at La Crosse, and have been working there off and on since 1867. I have hauled out on ways a good many steamboats and barges. I saw the steamer Col. McLeod at Bismarck, D. T., in December, 1879. I was sent there by Capt. Davidson with a marine pump, at the request of Isaac G. Baker, to assist in raising her. A marine pump is a large structure with an engine attached and — in pumping out boats. This one throws a stream about 15 inches in diameter. This is the only marine pump I know of this side of St. Louis. I think I got there Dec. 20, 1879. The pump did not come for several —.

197 The weather was too severely cold and the roads blockaded by snow. In the morning after I got there I went down and saw the boat—made some inquiries as to how she *be*came to be sunk; she lay out in the Missouri river about 50 feet from the ways—from the edge of the water where it came onto the ways. I cut a hole through the ice, sounded, and found six feet of water on her outside guard; she was pretty badly listed off shore. The head of the boat was broken down considerable—bent down. We got some chains under her; all the chains we could find around there; got some timber across, landed one end on the ice, for the purpose of holding her head up, as the water was cutting the sand away from under her bows and letting her head down. As soon as the pump arrived we set it to work; took steam from the steamer Butte, which lay inside the McLeod with her bows abreast—her boilers abreast—the after end of the McLeod's boilers; the Butte's guards lay right over the guard of the McLeod. We worked at it all day; don't remember how many hours the pump was working. We also had three large five-inch syphons; it did not have any effect upon the McLeod as to raising her. The Missouri river was then frozen over about 18 or 20 inches thick. We worked at her, off and on, several days;

ran the pump and syphons one day; had help enough for what tackling we had; there was a diver there from St. Louis with a diver's suit; but labors did not amount to anything while I was there. We could not raise her. The ways that I speak of were timbers, partly squared and partly hewn logs, covered with oak strips and laid on
the ground, extending back, I should think, 200 feet with a
198 slope of about an inch and a half to the foot. The steamer
Eclipse and Batchelder were there on the same ways at the upper or shore end; they were blocked up—levelled upon blocks. The oak strips of which I speak were greased with tallow. I saw some shores there which I supposed had been used to brace or prop up some vessel.

Question. About how many shores did you see, and what position or condition were they in?

Question objected to by respondents' counsel as incompetent and immaterial.

Answer. I think there were about 4 shores I noticed. Some of them were driven down into the ground and some were tipped over. I did not notice any stakes or footings at the ends of these shores. The soil or earth under these ways was Missouri mud—a mixture of loam and sand and clay. (All above taken subject to respondents' objection above noted.) The steamer Butte was, I think, about 240 feet long and about 44 feet beam; her carrying capacity about 800 tons. My experience in hauling out boats had been generally of smaller boats; think I never hauled out as large a boat on that kind of ways.

Question. From your experience in hauling out and handling vessels on ways and from seeing those particular ways and the slope, if the steamer Butte had been hauled out upon them, what would have been necessary, in your judgment, to have secured her so there
would be no danger of her overriding the shores and slipping
199 back into the river?

Objected to as incompetent and immaterial and inadmissible.

Answer. I would have put sufficient blocking under the lower side of the boat to carry so much of the weight of the boat as rested on the ways before letting go of the straps or tackles.

Question. Would a few cleats tacked into the skids with any number of shores resting upon the soil you have described have made her secure so that there would have been no danger of her overriding the shores and slipping back into the river?

Objected to as incompetent, immaterial, and inadmissible.

A. I never trust to shores nor cleats while a boat is lying on grease.

Question. If the tackling and gearing which hauled the Butte out on the ways, if she was so hauled out, had been left fastened would it not have made her more secure than shores placed under her knuckle and resting on the ground such as you have described?

Objected to as incompetent, immaterial, and inadmissible.

Answer. Yes; I had had some experience in regard to steamboats from which I could fix a value on them—had helped to build and repair them and had knowledge of the price at which some steamboats had been bought and sold.

Question. If the Col. McLeod had been afloat and in fair condition and not over two or three years old what would have been
200 her reasonable value at Bismarck at that time?

Objected to—1st, as incompetent; 2nd, because the witness has not shown himself competent to give judgment; 3d, that it calls for an opinion upon a state of facts which have not been shown to exist.

Answer. I judge that that boat at Bismarck, at that age and in good working order, would have been worth twenty thousand dollars. When I went there and during these operations to raise her, Capt. Paul Murphy was in charge of the McLeod, and the carpenter and, I think, the engineer of the McLeod were there. I think the Butte was in charge of her engineer; could not say positively; do not know his name; somebody was watching her. Capt. Mason was in charge of the steamers Batchelder and Eclipse. I know C. S. Weaver and Mr. Munger, said to compose the firm of C. S. Weaver and Co. I was at Bismarck 17 or 18 days, and during that time was shown about these boats every day; some days all day.

Question. What did Weaver do in the way of exercising authority and control over these boats while you were there?

Objected to as incompetent, immaterial, and irrevelant.

Answer. I don't think he did anything directly that I noticed.

Question. Who gave directions and exercised control over the Butte in getting up steam to assist in running the marine pump and the syphons?

Objected to as incompetent, irrelevant, and immaterial.

201 Answer. The man who was in charge of the boat; I don't know his name.

Question. What orders or instructions, if any, did Weaver give in regard to raising the McLeod?

Objected to as incompetent, irrelevant, and immaterial.

Answer. I don't know of any.

Question. Considering the circumstances and the surroundings and the appliances at hand, what more could have been done, if anything, than was done to raise and save the Col. McLeod?

Objected to as incompetent, irrelevant, and immaterial.

Answer. I don't think there could have been anything.

The said witness, JAMES ELDRIDGE, being cross-examined by defendants' counsel, testifies as follows:

One reason that we did not succeed in raising the Col. McLeod was that we didn't have sufficient apparatus, and the weather was

very severe and cold, and she was loaded down with sand, and the upper or shore side of her was covered up in sand. She was listed off shore. There was 18 or 20 inches of ice frozen all over her lower deck. With proper appliances I think she could have been raised. I never saw the steamer Col. McLeod only that time that I remember of. At the time I was there she was submerged so that I could see only her upper works; could see her boilers and the tops of her cylinders, but not her hull. I never bought or sold a steamboat. I never knew of a steamboat being bought or sold at or
202 near Bismarck, nor on the Missouri waters. I base my estimate of the value of this boat upon my knowledge of the cost of building and repairing boats at Rock Island, Dubuque, La Crosse and Winona. Of my own knowledge I do not know whether or not in November, 1879, at Bismarck, steamboats could have been sold for the cost of building them. The estimate I have given of the value of the McLeod is not what I judge to have been the cost of building her and taking her to Bismarck. I do not think she could have been built and takon to Bismarck for $20,000 in 1879. To have built and taken to Bismarck such a boat in 1879 would have cost, I judge, about twenty-five thousand dollars. I do not know what her dimensions were. I have built steamboats for myself and by contract.

JAS. ELDRIDGE.

Subscribed and sworn before me Jan. 9th, 1882.

WM. S. BURROUGHS,
Notary Public, La Crosse County, Wisconsin.

GEORGE S. WEEKS, a witness, produced and examined on behalf of the libellents, being first duly sworn, on his oath testifies as follows:

My name is Geo. S. Weeks; my age is 73 years; my residence, La Crosse, Wisconsin; my occupation is boat-building; I have been engaged in boat-building and repairing about 50 years; at present I am in charge of the ways at Capt. C. S. Davidson's boat yard at La Crosse, Wis.; have worked at this boat yard in La Crosse about 15 years; have worked in boat yards and on ways in New York, Buffalo, Detroit, Chicago,
203 and at Savanna, Illinois. During all of this time have been more or less engaged in hauling out boats and ships on marine ways; think in that time have helped to handle thousands of vessels. The ways with which I have been familiar are sliding ways. We gave more descent; if with rollers or cradles, less descent. In sliding ways the usual descent is about one inch and a quarter or one inch and a half to the foot. An inch and a half to the foot is about the steepest I have known any.

Question. In hauling out on sliding ways with a descent of one to one and a half inches to the foot, a vessel, say, of about 800 tons capacity, what would be necessary to secure her so as to remove all danger of her sliding back into the water?

Objected to by respondents' counsel as incompetent, irrelevant, and immaterial.

A. I generally nail what I can—"truck hooks" or pieces of plank 4 or 5 feet long—onto the ways with 4 or 5 good spikes, and sometimes more, in them. Sometimes four such pieces of plank and sometimes less, owing to the heft of the boat.

Q. You have heard Mr. Eldridge describe the ways at Bismarck, the nature and character of the ground under them, and also the size of the steamer Butte. Now, if she was hauled out upon those ways, greased as he has described, would you consider it prudent or imprudent to leave her over night resting upon the ways with shores set up under her knuckle, the lower end of the shores resting on the ground? Give your opinion as an expert.

204 Objected to as being incompetent, irrelevant, and immaterial. 2d, because a part of the question assumes the testimony of a former witness to be true; 3d, because a part of the question is based upon a statement of facts not shown to have existed.

A. I should consider it very imprudent and very unsafe.

GEO. S. WEEKS.

Subscribed and sworn to before me Jan. 9, 1882.

WM. S. BURROUGHS,
Notary Public, La Crosse County, Wisconsin.

PEYTON S. DAVIDSON, a witness produced, sworn, and examined on behalf of the libellants, testifies as follows:

My name is Peyton S. Davidson; am 53 years of age; reside at La Crosse, Wis.; occupation, lumbering and steamboat business; have been engaged in steamboating since 1855; have had experience in building, repairing, and hauling out boats and barges. I own the marine pump spoken of by the witness Eldridge. In December, 1879, I sent this pump, in charge of the witness Eldridge, at the request of Isaac G. Baker, to Bismarck, Dakota, to be used in raising the sunken steamer Col. McLeod. I know of no other marine pump on the Mississippi river above St. Louis. It is a large rotary pump used for pumping out sunken boats and barges. It is a steam pump, and I should judge it to weigh 3,000 pounds. I have always called it a 13-inch pump; it is about that. I own ways here for hauling out boats and barges; have owned them since 1873; have operated ways here since 1864; have had about 10 years' experience in hauling out boats and barges on sliding ways; have
205 handled a great many steamboats and barges on ways.

Q. Where a heavy vessel is hauled out on sliding ways having a descent from one to one and a half inches to the foot what would be necessary to secure her on such ways so as to prevent her sliding back into the water?

Objected to as incompetent, irrelevant, and immaterial.

A. I do not think a boat on sliding ways descending one inch and a half to the foot is safe without being blocked up from the ground so as to rest her weight on crib blocking.

Q. You have heard the witness Eldridge describe the ways at Bismarck, the nature and character of the ground under them, and also the size of the steamer Butte. Now, assuming his evidence to be true and that she was hauled out on the ways greased, as he has described, would you consider it prudent or imprudent, safe or unsafe, for such a vessel to be left over night with her weight resting on the ways with shores set up under her knuckles, the lower end of the shores resting on the ground? Give your opinion as an expert.

Objected to, 1st, because incompetent, irrelevant, and immaterial; 2nd, because a part of the question assumes the testimony of a former witness to be true; 3rd, because another part of the question is based upon a statement of facts not shown to have existed.

A. My opinion is that it would be imprudent and unsafe.

The said witness, being cross-examined by respondents' counsel, testifies as follows: I do not say that a vessel hauled out on
206 such sliding ways could not be made safe with shores, but it is not a practicable way of securing a vessel.

I think I sent the marine pump before mentioned to Bismarck from here on about the 17th day of December, 1879.

P. S. DAVIDSON.

Subscribed and sworn before me Jan'y 9, 1882.

WM. S. BURROUGHS,
Notary Public, La Crosse County, Wisconsin.

STATE OF WISCONSIN, }
County of La Crosse, } *ss:*

I, the undersigned, do hereby certify that, pursuant to the annexed stipulation entered into by the parties to the action within entitled, through their respective attorneys and proctors in admiralty, on this 9th day of January, A. D. 1882, at the office of P. S. Davidson, in the city of La Crosse, in said county, at the hour of 8 o'clock p. m., James Eldridge, George S. Weeks, and Peyton S. Davidson, witnesses, whose depositions are within contained, with the proctors in admiralty of the respective parties, as stated, attended before me, and then and there proceeded to take the depositions of the said witnesses, James Eldridge, Geo. S. Weeks, and Peyton S. Davidson, who, being first severally sworn to tell the truth, the whole truth, and nothing but the truth relative to the matters at issue in the action so within entitled, were examined by the proctors for the respective parties, and each testified as set forth in his respective
207 deposition, which he subscribed in my presence after the same had been read over to him.

Witness my hand and notarial seal, at the city of La Crosse, in said county, the day and year above written.

[SEAL.] WILLIAM S. BURROUGHS,
Notary Public, La Crosse County, Wisconsin.

Fees, $9.40; paid by libellants' proctors.

Endorsed: Filed November 22, 1882. William A. Spencer, clerk.

208 *Deposition of Charles Deitz, Taken at St. Paul on the 31st Day of May, 1882.*

ISAAC G. BAKER *et al. vs.* THOMAS C. POWER *et al.*

Present: J. H. Davidson, proctor for libellants.
Present: C. D. O'Brien (O'Brien & Wilson), — respondents.

Charley Deitz.

CHARLES DEITZ, of lawful age, being duly produced, sworn, and examined on the part of the respondents, deposeth and saith:

Direct examination by C. D. O'BRIEN:

Q. What is your name, age, and occupation? What is your age?
A. 42.
Q. What is your name?
A. Charley Deitz.
Q. What is your occupation?
A. Steamboating at present.
Q. What boat?
A. Steamer "Benton" at present.
Q. Do you know the parties to this proceeding—Baker and Power?
A. Yes, sir.
Q. Do you know the steamboat "Col. McLeod?"
A. Have seen her; yes, sir.
Q. And the steamer "Butte?"
A. Yes, sir.
Q. Were you mate of the "Butte" during the season of 1879?
209 A. I was mate of her part of the season; not all of the season.
Q. Were you such mate at the time she laid up?
A. When she laid up I was left a watchman on her.
Q. You were a mate on her until she was laid up and then became watchman?
A. Yes, sir.
Q. That was in the fall of 1879?
A. Yes, sir.
Q. Do you remember the time of the year?
A. I could not exactly tell. I got there on the 12th day of November; what day she was damaged could not exactly tell; laid there a couple of days.
Q. Do you remember the "Colonel McLeod" being laid up that fall?
A. Yes, sir; she laid above us and they dropped her down—Mr. Weaver and his foreman.
Q. After the Butte was laid up that fall was she hauled out on the ways?
A. Yes, sir.
Q. Who dropped her down to the ways?
A. Weaver & Co. and his foreman, Bob Haren.

Q. Did any of the crew of the Butte have anything to say about dropping her down to the ways?

A. Not if I know it. I was——

Q. Well, did you take any part whatever in dropping her down to the ways?

A. I do not know whether I did or not; I might have helped. If I did it was through Bob Haren's request.

Q. Was Weaver in the exclusive charge of her?

210 A. I think Weaver had charge of her, the way Johnson talked to me.

Q. Were you there when the Butte was being hauled out?

A. Yes, sir.

Q. Who was in charge of the hauling out of the Butte?

A. Mr. Weaver and Bob Haren.

Q. Whose men did the work in hauling her out?

A. His men; he worked his men.

Q. Did you have anything to say about the hauling out of the Butte?

A. No, sir; they borrowed blocks and lines—two lines and two pairs of blocks—and I showed them where they was and they used them.

Q. And that is all you had to say?

A. Yes, sir.

Q. Did you take any part in the operation of hauling her out or give any directions concerning her?

A. No, sir; all I did was I took care of the rigging.

Q. Did you take any part in the operation of the ways rigging for hauling the boat out?

A. No, sir.

Q. Or direct or do any work or give any commands?

A. No, sir; I gave no commands without Haren asked me to do something. He asked me about the things on her and I told him how to do it.

Q. How far did Weaver & Co. haul out the Butte before they took the tackle off of her?

A. I judge about 40 feet—between 30 and 40 feet.

Q. Did they haul her out to her berth on the ways, or had she not reached her berth?

211 A. They intended to haul the McLeod out on the ways and took the straps off of her and lay her farther off on account of the ice, and——

Q. Do you know how the Butte was fastened at the place on the ways where she was left? Did you see how she was fastened?

A. I see the shores. They had one to the stern, I suppose—well, 10 or 12 feet long, and then they had one four and maybe a little longer—square timber—and then in the middle they had—I do not know how many, but anyway three or four or five—somewhere along there—short shores, anyway—so that when she ran off the ways she ran on top of them and drove them into the ground.

Q. Did you have anything to say or do anything in the fixing up of the shores or fastenings of the Butte at that place?

A. I had nothing to say about it at all.
Q. You had nothing to say about it at all.
A. No, sir.
Q. Do you remember when they dropped the McLeod down to the foot of the ways?
A. Yes, sir.
Q. What time of day was it?
A. In the afternoon, I judge; maybe three or four o'clock; some time like that.
Q. Who dropped her down?
A. Bob Haren.
Q. Weaver's man?
A. Yes, sir; carpenter and foreman.
Q. Who assisted him in dropping her down?
A. His own men.

Q. When they got her dropped down where did they leave
212 her?

A. At the foot of the ways.
Q. Was there any reason or necessity for leaving her there?
A. Well, there was one way; they wanted to pull her out in the morning with the straps of the Butte, but when they got her down there it was quitting time for the men; they just laid them all down and quit and made her fast; their calculations was to put the straps on the next morning.
Q. Was it anything more than convenience to leave her there over that night?
A. They could have left her above.
Q. That is what I say. Was it anything more than convenience, the leaving her there over that night; was there any other reason than that of convenience?
A. All the convenience was to have her ready next morning.
Q. That is what I say; that is all.
A. That is all.
Q. Was there anything in the condition of the river, water, ice, or navigation that made it necessary to leave her there that night?
A. No, sir; but the calculation was from what I heard Haren say (his foreman) was that he wanted to drop her down to get the straps on her if he could, and so have her ready, but it was too late and the men quit, and they could not do it, and they had to leave her there over night.

Q. Were you there at the time of the accident?
213 A. Yes, sir; I was on the Butte. I was reading a newspaper.
Q. You were then watchman of the Butte?
A. Yes, sir.
Q. As watchman of the Butte what were your duties?
A. My duties was to take care of her property; that was all I was left there for.
Q. You say that you was on board of the Butte reading a newspaper when the accident happened. What time of day or night was it?

A. I judge it must have been between 7 and 8 o'clock. I could not tell exactly what time it was, because I was sitting there reading. I know it was pretty late; between 7 and 9, but whether it was before 8 I could not say.

Q. Well, what happened?

A. I was sitting there reading a newspaper. It was dark, and I heard the wind blowing considerably, and then I heard something crack; looked up right quick, you know, and saw a stream of light flash along there. I looked up and saw a star, something like a star, run very — flash across there, you know. I jumped and looked through the door, and when I got outdoors she ran down quick, and crack, and she struck and ran into the river, and after she struck the McLeod I jumped down—had no line out—and I went over to the McLeod, took hold of her line and made fast to her capstan and held her there until the men came aboard, and I said to the boys on the hill, come down from the hill, and I said take hold of this line and make it fast to a dead man; they did so, and I said to Charley Bagley
214 and McClendon, the pilot on her, and I said, "Now, boys, put your pumps in right quick." Well, Bagley was very badly scared, and in fact both of them was very badly scared, because Bagley was down in the hold at the time the boat struck her. She was leaking very badly; that is what Bagley told me, anyway. Bagley says, "I can't do it," and I says, "Just run right down;" I saw water in the Butte, you know, and I said, "There is a hole in this boat, sure." Well, when I got done through looking there I went over to the McLeod, and I saw she was half full of water. I saw it was too late to do anything; I saw they could not pump her out with five hundred men.

Q. Let me ask you if after — Butte struck the McLeod would the Butte have floated off down the river if you had not made her fast to the McLeod's capstan?

A. Yes, sir.

Q. Then the Butte ran down the ways and floated in the water?

A. Yes.

Q. And if you had not made her fast to the McLeod's capstan she would have gone down the river?

A. Yes, sir.

Q. And when you got a line onto a dead man you let go of the line on the McLeod?

A. Yes, sir.

Q. State whether or not the Butte laid on top of the McLeod and pressed her under the water or merely shoved her out into the stream.

A. When she struck the McLeod the two boats together
215 were thrown out across the river—both of them.

Q. They swung out into the river?

A. Yes, sir; and when they commenced sinking the current carried them both back into the shore; by that time I had my line out; the men about the levee helped me get a line out. We got the line out and we made her fast.

Q. When you say they swung out across the current you mean their bows swung out, not their sterns?

A. Yes, sir.

Q. Did the Butte or any part of her lay on top of her or press her down into the river?

A. Not that I know of.

Q. Were the boats fastened together in any way, or just lying alongside of each other?

A. Just lying alongside of each other, because I dropped her back 10 or 15 feet after I got my line out, to give the McLeod a chance to come in.

Q. Did you observe or notice or was it a fact that any part of her (the McLeod) was broken from by a blow from the Butte?

A. Not if—you know I could not see.

Q. What is your best judgment whether it was or not?

A. Well, after she filled with water.

Q. What is your judgment; did the leaks exist in her or was it new leaks in her before the Butte hit her?

A. That I could not say. The Butte hit her and might have sprung some leaks in her—sprung some butts.

Q. Had you seen the McLeod before this accident, when she lay there at the levee, or while she was laying at the ways, so as to know her condition?

216 A. Well, she was out of water and looking very well, except that they said she was leaking very bad—the captain said; heard the captain say——

Q. Well, Mr. Deitz, did you examine her condition?

A. No, sir; I did not. I know there was water in her.

Q. Was the pumps kept going on her while she was laid up?

A. I do not know about the pumps; I did not notice.

Q. When the Butte was dropped down to the ways was she dismantled and her machinery disconnected?

A. Her machinery was all taken out; everything was taken out for the winter.

Q. She could not have run?

A. No, sir; everything was taken off of her; everything was out.

Q. How was it about the McLeod—was she dismantled?

A. I do not know; I could not say anything about that.

Q. Had the crew of the Butte been paid off and discharged?

A. Yes, sir; every person was paid off and gone off but me.

Q. And you were watchman?

A. Yes, sir.

Q. And had your pay and position as mate ceased?

A. My wages dropped the very minute I commenced as watchman—45 dollars a month.

Q. And how long before the day of the accident did you become watchman?

A. I do not know; I commenced watchman the next day after we landed; we landed on the 12th, and I commenced as watchman on the 13th.

Q. This was some two or three days before the accident?

217 A. Yes, sir.

Q. Did you remain there after the accident?

A. Yes, sir; all winter.

Q. State whether or not the McLeod could have been raised that fall.

Objected to because no proper foundation has been laid showing witness to be an expert.

Q. Well, Mr. Deitz, how long have you been running on the river?

A. Well, I have been steamboating for the past—well, ever since 1867 and before.

Q. Are you familiar with the methods of raising sunken steamers?

A. I cannot say I am. I have seen them raised.

Q. Have you seen some raised?

A. Yes. I have seen them raised, sunk, and blowed up.

Q. You have seen some raised?

A. Yes.

Q. You know the river at that point, do you not?

A. Yes, sir.

Q. Well, from your knowledge of the river at that point, your experience as a steamboat man, and your knowledge of the appliances which they had there at the ways at that time, state whether or not, in your opinion, the McLeod could have been raised and hauled out onto the ways.

A. Well, that is a question that I can hardly answer.

Q. Could she have been hauled out onto the ways?

218 A. No, sir; not at the time that she sunk, because she was too low for the ways. She could not have been hauled out at that time.

Q. Could they have raised her and then hauled her out?

A. Yes, sir; possibly they could have raised her.

Q. Just your opinion.

A. My opinion. Well, from what I seen there after the diver, the marine man, came, if she had been let alone I think she could have been raised; at least he told me so.

Q. What is your opinion; do you think she could have been raised?

A. I do not know; there was three feet of ice or more and it would have been pretty hard to raise her, but still, you know, in the spring——

Q. I mean in the fall; could they have raised her before the ice formed?

A. I suppose she could, if she had a little more power about her.

Q. How deep was the water; how deep where she was sunk?

A. Well, suppose about 8 feet; something like that; 8 feet to 3 and a half and four feet.

Q. How was it about raising her in the spring; could she have been raised in the spring?

A. Well, this Mr. McGuire——

Q. In your own judgment.

A. I must tell it in my own way. When Mr. McGuire came there the diver came there; he had two pumps—two big pumps—and he pumped her, and the pumps was coming up, and when the
219 boat was coming up found a leak in her stern. I do not know what caused that leak, any more than there was a leak in the stern. He found it and he commenced putting on his suit—his diving suit—and got it on and put his head on and was going down and put a piece of canvas over it, and then the Davidson pump gave out.

Q. The La Crosse one?

A. The one from La Crosse; and then she filled full of water and went out of sight.

Q. You think, then, that if the Davidson pump had not given out she would have got up all right?

A. Yes, sir; I think they could have got that leak in the stern stopped.

Q. Now, Mr. Deitz, some of the witnesses in this case have said that when they were hauling out the Butte you were giving orders and instructions about hauling the boat out; is that so?

A. Well, now, I will tell you what I done—all the instructions that I gave, you know. They came and said that they had not power to haul the boat out, and Captain Johnson says to me, "Charley, anything that they want out of that boat give it to them," and I gave them two sets of blocks and two lines—an inch and a half line.

Q. But they say you bossed the job to some extent and gave orders and instructions about hauling out the Butte; is that so?

A. No, sir; I had nothing to do with the hauling out of the Butte.

Q. Had you any power or authority to interfere with the hauling out of the Butte or give any orders or instructions about her?

220 A. No, sir; all the orders I had was that Johnson told me to take care of her property.

Q. Had a watchman any power to interfere or direct concerning the hauling out of the boat?

A. No, sir.

Q. No power?

A. No, sir; nothing but to take care of the rigging; if they asked me for anything, gave it to them.

Q. All the furniture and property of the Butte was left on her?

A. They were always left on those boats in the fall; they generally are.

Q. They generally are left on?

A. Yes, sir.

Q. Your business was to take care of her that winter?

A. Yes, sir; to take care of her property; that was all; I was right there all the time.

Q. And that was the extent of your authority and power?

A. Yes, sir.

Cross-examination by J. H. DAVIDSON:

Q. Had you known Bob Haren before you met him on the river?

A. No, sir.

Q. Did he or Weaver do most of the bossing of the job in reference to the hauling out of the Butte?

A. Bob Haren, I think, was the main man.

Q. You had been about the river and about ways for repair a good deal, then?

A. No; I could not say that; I had seen them, but never had much to do about them.

221 Q. Did Bob Haren seem to be a man familiar with the handling of steamboat tackle?

A. Yes, sir; he was one of those slow and easy going men.

Q. He asked you to tell him how to use the block and tackle and make fast to the Butte, didn't he?

A. No, sir; not the Butte.

Q. Did he the McLeod?

A. He asked me just this one thing and in this way—the ice was running—he says to me: "How in the hell am I going to get that strap on that boat?" Just that way. I said, "Bob, that is easy done." A fellow named John Lyons still said that he didn't know how to get that line along there. I said, "That is easy done;" and he said, "How are you going to do it?" and I says, "I will show you;" and I took two or three strips of board about as thick as my hand, nailed them together, and ran them under the boat, dropped the small line under that, hauled it through, and made it fast to the strap and hauled the strap through. I told Haren, and he done so.

Q. Bob, then, didn't seem to thoroughly understand how to get along under the emergency with the ice running and the Butte laying there; didn't know how to get his strap fast?

A. Well, the ice was forming in the river and the wind was blowing; the river was freezing.

Q. Well, Mr. Deitz, how were these ways on which they hauled out the Butte; were they oiled or soaped—greased—so as to make them slip?

A. Yes, sir; they put grease on them.

222 Q. Was it cold enough as they hauled the Butte out where it was wet—did it freeze into ice on her bottom?

A. I could not say as to that; I did not notice that.

Q. Was it cold enough, do you think—was it cold enough to make it kind of slip?

A. Yes.

Q. Did you notice how those shores were at the bottom?

A. Yes, sir.

Q. How were they set?

A. They had one shore on at the stern; maybe 10 or 12—somewheres along there—and made it fast down into the ground, I think, and put it against her hull.

Q. Her stern?

A. Yes, sir; supposed to be a long shore; then there was—do not know now—three or four——

Q. Short shores?

A. Yes; stuck against her knuckle; and then forward they had one shore that was, maybe, I suppose, 14 feet long—a square piece of timber—pine timber—maybe 10 or 12 inches thick; they said it would hold pretty well, I believe; and when I was sitting in the boat and had a lamp alongside of me and was reading a newspaper I heard something crack; looked up and saw a star running, and thinks I there is something up, and jumped up and went out the door; but then it went down as quick as that (witness striking his hands).

Q. It went down as quick as a flash?

A. Yes.

Q. Mr. Deitz, did it throw you off your feet—the concussion—when it struck the McLeod?

223 A. When it struck it it startled me considerably; it did not exactly throw me off my feet.

Q. Was it much of a blow?

A. Yes, sir.

Q. Injure things considerably on the Butte?

A. Yes, sir; it broke her nosing and broke part of her boilers; I saw them; it threw one end of her boilers 11 or 12 inches out of place and the other end just 6.

Q. Threw one end of her boilers 12 inches out of place and the other just six?

A. Yes.

Q. How heavy do you think that boiler was?

A. There were two boilers there; I do not know how heavy they were; they were twenty-six feet long and thirty inches in diameter.

Q. The boilers would weigh some thousands of pounds?

A. That is pretty heavy.

Q. Did you hear any timbers on the McLeod crack as if something had been broken when the boat struck her?

A. You have got me now; I could not tell you.

Q. You did not have time to look down into the hold of the McLeod to see what her injuries were?

A. I just went over and looked; saw she was taking water, and thinks I will go take care of my boat and let the other boat go.

Q. Did it seem to be running in rapidly?

A. Not very fast; it was half an hour or so before she sunk; she was a long time sinking.

Q. Well, now, Mr. Deitz, what was the reason that the Butte

224 broke down and overrun her shores in that way, in your judgment?

A. Well, I do not know just what. I have thought about it ever since—what was the cause of her going down over the shores.

Q. Was there any hutchicks nailed onto the ways under the knuckle of the Butte?

A. That is what I do not know.

Q. Did you see any anywhere?

A. No.

Q. Any footings placed at the bottom of these shores that you saw—sticks to hold them from being driven into the mud?

A. All I know about the shores was, I seen the shores at the stern and I seen a man digging there, but how deep he dug or how he fixed it I could not say.

Q. How late in the day was it when Johnson left the Butte, when they were hauling her out, before they left her on the ways?

A. He left her after they laid her up there and the men quit.

Q. He was around the boat until the men quit?

A. Yes; but did not do anything—just stood there with his hands in his pockets.

Q. As they hauled the Butte up on the ways was Captain Johnson on her—on the Butte as they were pulling on her, do you know?

A. I do not suppose he was on her, because I was looking on and was anxious to learn something about the pulling of her. He might have been there and he might not.

225 Q. What was the reputation of C. S. Weaver as to being an experienced man in hauling out boats, do you know?

Objected to as not cross-examination.

A. Well, I do not know anything about Weaver. All I know about him—he was a perfect stranger to me. I never knew anything about him until then. I have heard people say he was a house carpenter. I have heard people state that.

Q. Was Captain Johnson an experienced steamboat man, as far as you know?

A. That is the opinion of every person, I believe.

Q. Then you know him to be an experienced steamboat man?

Same objection.

A. Yes.

Q. You speak about the wind blowing. Was there anything like a hurricane, or simply a strong wind?

A. A tolerably strong wind. No hurricane. A pretty heavy wind.

Q. Mr. Weaver stated under oath that, in his judgment, there was a strong gust of wind that blew her up the ways, and when it lulled, or when there was a flaw, she slid back of her own momentum, and that it made her override her shores. Now, was there any gust of wind strong enough to move the Butte and shove her off the ways?

A. I believe not. I did not see it. Not strong enough to move the Butte.

Q. You did not feel any such wind as that?

A. No, sir. Of course there was a little wind, but nothing like that.

226 Q. Now, from the time you heard the cracking that started you, and looked through the door and saw that star you speak of flying rapidly, until the moment she struck the McLeod and you heard the crash of breaking timbers, how long do you think it was?

A. I could not tell you; it was fearful quick.

Q. How long was it?

A. I just got up and went out of the door when she struck that boat.

Q. And you sprung to your feet as quick as you could?

A. If I could have got up I would have got up, but did not have time.

Q. When you heard the crash did you see where Charley Bagley was—whether he was in the hold of his boat, or where?

A. I did not see him when we struck; you know I did not have time to look after any person just then. I got a line and made her fast as quick as I could; heard the crash upon the hill, and I says, "Boys, help me with the line," "Do come help me with the line." The boys helped him take the line up to a dead man and then commenced looking around to see what was going on. Then Bagley came up, scared to death, and he says, "What's the matter?"—looked around and says, "Where's your lamp?" says, "Down in the hold?" I says, Jump in with those men and get them to work to stop up the leak. I says, Offer them money and they will pump; and he did not get them to work. Old man McClenden was pilot of her. Instead of trying to save her he had one of those big——

Mr. DAVIDSON: Trunks?

227 No it was not a trunk; it was a chest; that is what it was. Instead of taking charge of the boat, he came over there to the boat and sat down there.

Q. This man McClenden was an old man who had been on the McLeod and was her pilot, was he not?

A. Yes.

Q. You- pilot and all the crew except yourself had been paid off and gone?

A. Yes; they were all paid off—deck hands and roustabouts; everybody was paid off. The engineer paid his fireman off and the captain paid the engineer off. He paid me off and then hired me over as watchman.

Q. You stayed on the Butte all winter, did you not, as watchman?

A. Yes, sir.

Q. How soon after the McLeod sunk did the ice begin to run down in the Missouri river?

A. Well, it was not very long.

Q. A few days?

A. A few days.

Q. Was there any marine pump or any barges or any apparatus suitable for raising a sunken boat there at Bismarck on the night of the accident?

A. No, sir.

Q. Did you know of any marine pump closer than La Crosse or Saint Louis?

A. I did not; there might have been.

Q. Before the marine pump and the diver got there was there not some heavy snow storms that delayed the N. Pacific trains?

A. I believe there was some difficulty in the trains; I could not say exactly, but think there was a little difficulty in the trains.

228 Q. When the diver and marine pump got here was it not cold and wintry?

A. Yes, sir; very cold.

Q. Had the Missouri river frozen over and the ice stopped running?

A. Yes.

Q. Was the ice not very heavy over the hold and upon the deck of the McLeod as she lay in her sunken condition?

A. The water froze in her hold.

Q. What made the Davidson pump give out?

A. I do not know; I could not tell you that. What it was I do not know.

Q. Which was the biggest of the two pumps?

A. I think Mr. Weaver's was; it was the biggest in size. I do not know whether it was the biggest in throwing water or not.

Q. Is not the character of the Missouri river at — point — that it is generally sandy and level and cuts away with the shifting of the current?

A. Yes, sir.

Q. Some of the witnesses at Bismarck have testified that there was different sets of capstans and tackling used in hauling out the boat, and that you did some bossing and directing in hauling out the boat. Is there anything to that?

A. I had nothing to do with it any more than as I say. Mr. Weaver and Mr. Haren, his foreman, I gave them a pair of blocks—two pairs of blocks—and two falls to use to help pull the boat out, and that is all; that is all. I was standing around and

229 keeping them from destroying them.

Q. Could the Butte have been secured on the ways where she was so that accident would not have happened?

A. Well, I suppose they could have done it very easily; they could have fixed her so that she would never have got off; I suppose when they left her they supposed that they had her secured; they thought they had her secure; I suppose every person there thought so at the time.

Q. You did not make any examination to find out whether or not that night she was secure or not?

A. No, sir.

Q. Something you had nothing to do with?

A. I was only to take care of the rigging.

Q. Johnson went away when they commenced to pull her up?

A. He was there until they pulled her up—standing there when they took the straps off, and then went up to the Sheridan House where he stopped.

Q. That was the evening she was propped up?

A. Yes, sir; I felt all right.

Q. You felt safe enough then?

A. Yes; I did not think about an accident; I did not look for that; tell you everybody was very much surprised when it happened.

Redirect examination:

Q. Captain Paul Murphy was the captain of the McLeod?
A. Yes, sir.
Q. Did anybody take care of the Butte through the winter? Who took care of her during the winter?
230 A. She was in Weaver's charge. I done a little work for him and he paid for it—whatever I done he paid me.
Q. Took care of the hull all winter?
A. Yes, sir.
Q. She remained in his charge all winter?
A. Yes, sir.
Q. Did he haul her out on the ways in the spring?
A. The ice threw her up.
Q. The ice hauled her up?
A. Yes.
Q. Did he block her up?
A. I did it for Mr. Weaver. I was working there, but Mr. Weaver was doing all the paying—he done all the paying; he paid the men to put her up in the spring.
Q. So she remained in his charge from the time she was dropped down to the ways in the fall until the time when she was shoved off into the river in the spring?
A. Yes, sir; I think that was in April; I had it all down in a memorandum.

(Endorsed:) Filed Nov. 23, 1882. Wm. A. Spencer, clerk.

231 United States District Court, District of Minnesota. In Admiralty.

ISAAC G. BAKER *et al.*, Libellants,

vs.

THOMAS G. POWER *et al.*, Respondents.

Mr. J. H. Davidson appeared as libellants' proctor; Mr. C. D. O'Brien appeared as respondents' proctor; also present, J. K. Weatherby, notary public.

Mr. G. S. WEAVER, of lawful age, being duly produced, sworn, and examined on the part of the libellants, deposeth and saith:

Direct examination by Mr. DAVIDSON:

Q. Your name is G. S. Weaver?
A. Yes, sir.
Q. You reside at Bismarck?
A. Yes, sir.
Q. Dakota Territory?
A. Yes, sir.
Q. You are a member of the firm of C. S. Weaver & Co., are you not?
A. Yes, sir.

Q. Mr. Weaver, what is your age?
A. Thirty-nine years of age.
Q. What is your occupation?
A. Well, we are dealing in building material; also, we carry on building.
Q. House building?
A. Yes, sir; all classes of buildings.
Q. Are you a mechanic?
232 A. I am.
Q. What line?
A. I am a carpenter by trade, although I am pretty well versed in all branches of mechanics—ordinary mechanics.
Q. How long have you been carryiug on the business of building and furnishing building materials in Bismarck?
A. Forty-six years.
Q. Did you reside here in the year 1880?
A. I did.
Q. What knowledge have you of certain ways that were built upon the bank of the Missouri river for repairing vessels?
A. When that company was organized I was selected as one of the company. The title of the company was the "Bismarck Marine Ways and Dock Company."
Q. When were those ways constructed and where?
A. I do not remember what year they were constructed; I think, though, in the fall of 1878.
Q. Constructed in the fall of 1878?
A. I think so; yes, sir.
Q. And where?
A. On the river bank, in section 6, about one mile west of the city.
Q. Near the steamboat landing?
A. Just below the steamboat landing.
Q. And on the bank of the Missouri river?
A. Yes, sir.
Q. Just describe, as carefully and briefly as you can, what those ways were.
A. They were built of a series of two pieces of ties, with timbers, with 10 by 12 strong timbers, and on the top of these was
233 an oak strip and then a series of grubs at the top at the upper end of the ways—that is, an inclined plane built to pull steamboats up on to repair them.
Q. About what was the width of them up and down the river?
A. 200 feet each way.
Q. And what was the length of the incline from the river end up to the upper end, the length of the incline?
A. 200 feet each way.
Q. Do you remember about how many bed pieces and strips there were?
A. There were twelve of them.
Q. Twelve of them?

A. Twelve of them originally; there were very few boats that would reach over eleven.

Q. Mr. Weaver, about what was the incline per foot on those ways—about what was the slope?

A. I don't know the slope. I may have heard it at one time. I know it was conceded that it was not what it should be, because a vessel would not launch itself there; it had to be pushed off. That slope was conceded to be too little because a boat would not slide off of its own momentum.

Q. What did these two bed pieces rest on?

A. The two bed pieces were 12 x 16, bedded in the ground on the same principle as you tie a railroad; on the same principle as the ties on a railroad; these bed pieces were sixteen feet long, and the ways were sitting on each end of them, so that every other two string pieces would make one pair, on the same principle as a railroad; these, however, would be 16 ft. apart.

234 Q. Who had charge of these ways during the winter of 1878 and 1879—the first winter after they were constructed; do you know?

A. Capt. Braithwait had charge of the construction of them, and during the winter the directors had a general oversight of them; they kind of run themselves. The directors tried to have the oversight over them. I think that the ways company did only pull out one boat—that was the Sherman; they employed parties to do that.

Q. Did you have charge or oversight over them in any way during the winter of 1878 or 1879? Did you have charge or oversight over them during the first winter that they were constructed?

A. Only as one of the directors.

Q. Only as one of the directors of the company?

A. Yes, sir; only as one of the directors of the ways company. I received no compensation for what I did for them that winter.

Q. Who came in charge of the ways in the fall of 1879?

A. C. S. Weaver & Co., practically as employees of the ways company.

Q. Who was C. S. Weaver & Co.; who constituted the firm?

A. C. S. Weaver and R. S. Munger, of Duluth.

Q. About what time in the fall did you take charge of the ways for the company—that is, C. S. Weaver and Co.?

A. As near as I can recollect, I think it was in the fore part of October.

Q. What experience had you had previous to that time in hauling out and repairing steamboats and vessels?

235 A. Well, I had never had any experience in hauling out steamboats, but I had a little experience in repairing steamboats, because I had worked on steamboats as repaired years ago.

Q. Had you ever hauled out any boats?

A. No, sir; that was my first attempt.

Q. Mr. Weaver, what was the first vessel hauled out on the ways in the fall of 1879 after you took charge of them?

A. The first one that was hauled out was the steamer "Eclipse."

Q. How were the ways fixed for hauling out a boat; what tackle was made ready; how were they fixed as to being made smooth?

A. Well, I do not know as I can precisely describe the ways. There was an oak strip on top which would hold the grease, and this made a smooth passage down, and then we used six sets of blocks and lines and a strip that we passed round and which we fixed outside of these lines; there were capstans there, from an inch and a half to three inches in diameter, and then we had six capstans that we used with hawsers.

Q. Do you remember about what date the Eclipse was hauled out?

A. No, sir; I could not tell you that without referring to my books.

Q. What was the next boat that was hauled out after the Eclipse?

A. The steamer "F. Y. Bachelor."

Q. How were these boats received after they were hauled out onto the ways; what was done with them?

236 A. Well, the ways was not an incline all the way up, but there was a gradual incline up to a certain point where they were nearly level, and I think they were just secured by a stick of timber at each end, spiked on the ways.

Q. That was done in reference, do you mean to say, to these boats after they had passed the incline and was shoved up to that part of the way that was nearly flat, and that you mean was the way in which these boats were secured?

A. Yes, sir.

Q. What boat was next hauled out?

A. The steamer Butte.

Q. Who was in charge of the steamer Butte when the proposition to haul her out was made?

A. Captain Johnson and his mate were both there practically in control of the men of their boat in their position as captain and mate.

Q. Was there any of the crew there that you know of—watchman?

A. I do not know whether there was or not. I cannot remember at this time.

Q. What time in the day did you make fast to her to haul her out—put your tackle on?

A. Along in the afternoon, I think.

Q. When did you commence to pull her out on the ways?

A. Some time during the afternoon. I think we raised the boat out of the water that night, if I remember rightly.

Q. Then what was done the next day?

237 A. She was pulled; we had our lines; our lines were in such a shape that we had to fleet the blocks. As soon as we pulled the blocks up together and drew them back with the capstans and got things in shape we drew her up that day for a distance perhaps of 60 or 70 feet; the blocks came together for a distance perhaps of sixty or seventy feet; we left the boat there that day.

Q. That was the second day?

A. Yes, sir.

Q. About what time in the day was it that you got her up there?

A. We got her up there probably about this time.

Mr. C. D. O'BRIEN: Well, wait now; let us fix that time—about twenty minutes to ten?

A. About 10 or 11 o'clock in the day; along there; I do not remember just the hour.

Q. Do you remember, Captain, about what date that was in November?

A. I could not tell you without referring to some books.

Q. What was the condition of the weather at that time, Captain Weaver?

A. I do not recognize the title, but I think it was very pleasant; think the weather was growing cold and freezing some in the morning.

Q. Any ice forming in the river at that time?

A. Oh, well, I think, perhaps, there was along the banks and a little blush was running; do not remember as to that.

Q. Who was on the ground representing the Eclipse?

A. There was not any one. She was in the hands of a
238 U. S. marshal.

Q. That was the year she was seized?

A. Yes, sir.

Q. Who was here representing the Bachelor?

A. Captain Mason was there. I think he stayed there all the time.

Q. And who was in charge of the steamer Colonel McLeod?

A. Captain Murphy, I think, was at that time, although I do not know whether he stayed on board of the boat all the time or not. Mr. Bagley was doing practically the work about her. He was the watchman.

Q. The Butte, you say, was gotten up the second day as far as you could take her with the block and tackle, until you changed them again?

A. Yes, sir.

Q. And what was done then?

A. She was shoved up and left on the ways.

Q. Under what arrangement was the hauling out of the Butte done? Was it a verbal or a written contract?

A. A written contract.

Q. What contract or arrangement had you in reference to hauling out the Colonel McLeod on these ways?

A. Oh, well, that was a kind of an understanding.

Q. Captain, you may state what took place between any owner or master of the McLeod and yourself, or any officer of the Col. McLeod and yourself, in reference to hauling her out that you say constituted the understanding, giving the conversation as fully as you can as you now recollect it, or the substance of it.

239 A. Along before the Col. McLeod made her last trip up the river she was at the landing, and Captain Murphy introduced

me to Captain Baker as the person who probably would have charge of the ways that winter. Col. Baker remarked that their boat would have to come out.

Q. You mean Captain I. G. Baker?

A. Yes, sir; he was introduced to me as the owner of the boat; do not know whether he owned the whole of her or not. He was one of the owners. It was always called "his boat" by common report, and he asked me the probable cost, and I told him that we had arrived at no conclusion as to what the cost would be, and he said the probability was that we would treat him the same as we did the others, and he said he would come and see me at the office before he went away, and I do not know—I am not sure—whether he spoke to us again about it or not; I am not certain about it, but when the boat came back they went down to Lincoln to discharge some freight, and as they came back Captain Murphy hailed me and asked me when I would have the boat left, and I think that the next night I saw Mr. Edwards, who was the clerk of the boat, and he asked me if Colonel Baker had made any contract with me in regard to hauling her out, and I told him he had not. "Well," he says, "he promised to before he went away." He says, "I will come over to your office and see you in the morning," and that was about all the agreement there was to it. It was assented all around that the boat would be hauled out, and it was a general understanding that it was to be done.

Q. Did Edwards the next morning come to see you?

A. No, sir; he did not.

240 Q. Where was she left for the purpose of being hauled out?

A. Just above the ways, on the river bank.

Q. About how far—1, 2, or 3 lengths? Fix it in that way.

A. Perhaps three lengths; not more than that.

Q. About when did you go or send men to the McLeod to drop her down to the ways—about what time in the day?

A. Between 10 and 11—no; it was between 11 and 12 o'clock.

Q. On the same day you speak of as having made the last pull on the Butte?

A. Yes, sir.

Q. What did they do with her?

A. Well, we worked that night getting her down. The wind was blowing; we had very hard work to drop her down. We had no steam on her; poles and spars to get her off shore. We had very hard work to get her down to the foot of the ways that night.

Q. And how was she made fast?

A. I think she had two lines out at the bow; that was all.

Q. And how did she lay with reference to the foot of the ways?

A. She lay in position—right in front of them.

Q. She lay right in front of them?

A. Yes, sir; she lay right in front of the ways.

Q. Against the ways—against the ways where they went into the water?

A. Yes, sir.

Q. Who was on the Col. McLeod at the time your men were dropping her down representing the owners?

241 A. The watchman was there; do not know any one else. Mr. Bagley and Mr. Hazen, who was acting as my foreman, took about half the crew we had, and I was willing myself and ready to hook onto her with the rest of the men.

Q. About what time in the evening did you quit work?

A. Six o'clock.

Q. What kind of evening was it—was it clear or cloudy?

A. I think it was considerably cloudy; it was a good while ago to remember the weather.

Q. When did you next go back to the Butte and the McLeod—when did you next go back to the position where they were that day or night; what time that day or night?

A. I should say between eight and nine o'clock, or eight o'clock; somewhere about that time; about eight o'clock.

Q. What condition did you find the Butte and the McLeod in when you got there?

A. Well, sir, the Butte had slipped down the ways against the McLeod, and when I went down there I heard some one say "She is just about down"—that is, to sinking then.

Q. The McLeod was sinking?

A. Yes, sir; and I think it had not settled on the bottom quite, but very nearly down.

Q. And the Butte had slid from where you left her down against the McLeod?

A. Yes, sir.

Q. What was then done to try to prevent her sinking or to save her?

A. I do not know that anything; I only stayed there a few minutes; we saw that nothing could be done that night.

242 Q. Did you make any examination to ascertain how much of a leak there was in the McLeod?

A. No, sir; we could not then; we could not there, for her bow was in seven feet of water, if I remember rightly, and it being dark (there was no moon), we could not make any examination.

Q. Was Captain Johnson down there—Captain Johnson, of the Butte—was he down there that evening? Did you see him?

A. I think he was.

Q. Was the mate of the Butte there?

A. Yes, sir.

Q. What was his name?

A. Charley Deitz.

Q. No you know where he is now?

A. No, sir; I do not.

Q. Who was there on or about the McLeod, as far as you remember?

A. Well, I do not remember. I think Captain Murphy was there, and during the evening there was probably a hundred people there.

Q. A great many people went down there after the accident?

A. Yes, sir; and a great many of the workingmen who were liv-

ing along the river in dug-outs and one or two board-houses down there, and they flocked to the boat as soon as they heard of the accident.

Q. Who took charge of the McLeod after she sank?

A. Captain Murphy had virtually the charge of her.

Q. Had you anything to do with her?

A. The next morning after she sank the men I had
243 took the boats off and some things that were liable to be hurt by water, and took her spars, her derrick, I think, and took them up on shore, and nothing was done that day. I think Captain Murphy took charge of her condition.

Q. Was there any such thing here as a marine pump, as far as you know?

A. No, sir.

Q. Any diving suit or apparatus?

A. No, sir.

Q. State what, if any, apparatus in the way of diving suits or diving bells or marine pumps was here accessible at this point to be used in raising a sunken boat?

A. I do not know of any.

Q. As far as you know, where was the nearest marine pump or diving suit or diver?

A. I do not know of any diver this side of Saint Louis; I believe the Davidson Line, at Saint Paul, have some such arrangements, but I do not know for a surety; I know they have a pump.

Q. What was done with the steamer Butte after the accident?

A. The next morning she was dropped below the ways; dropped down against the river bank.

Q. Who remained in charge of her through the winter?

A. Charles Deitz, who had been mate of her.

Q. Do you know whether Mr. McClenden, one of the pilots of the McLeod, was there the night of the accident?

244 A. I don't know him at all.

Q. What was the depth of the water and the character of the bottom at the end of the ways where the McLeod sunk?

A. It was quite deep. I think her bow when she sunk was laying in seven feet of water, and a little deeper aft.

Q. Was the bottom a flat bottom, or was it gradually growing deeper as you went out from the end of the way—a sloping bottom?

A. I think it was deep water, although I know at one time we found that there was 10 or 15 feet of water at the end of the way, but yet cannot tell anything about the bottom of the Missouri river. It may be smooth bottom to-day and to-morrow there may be holes in there where you can scarcely find soundings.

Q. The bottom, then, was an ordinary sand bottom?

A. Yes, sir.

Q. The bottom was an ordinary sand bottom such as is generally found in the Missouri river?

A. Yes, sir.

Q. Did you make any soundings later to find out whether that

bottom was cut away by the sinking or whether it remained about as it was as she sunk?

A. No, sir; I did not make any, but saw them made.

Q. Well, it began to cut away under the bow, did it not?

A. Yes, sir.

Q. How soon after the accident did ice begin to form about her and over what part of her hull that was submerged?

A. I should say about a week.

245 Q. Had any diving apparatus arrived up to that date when the ice began to form?

A. I do not remember.

Q. Did you have anything to do with the various attempts to raise her after the marine pump arrived here?

A. Nothing more than that; I hauled some material for that purpose—that is, C. S. Weaver and Co.

Q. Who did you make your contract with for the hauling out, blocking up, and putting back into the river of the steamer Butte; was it with one of the owners or officers of the Butte?

A. I think all the talk — made with J. C. Barr, who was agent for the "Benton Line" that year, but the contract was, I think, completed by the captain, A. M. Johnson.

Q. What was the general character of the contracts made with the other boats, the Bachelor and the Eclipse, as compared with the contracts made with the Butte?

Mr. C. D. O'BRIEN: Were the other contracts in writing?

A. The Eclipse was ordered hauled out by the court, and I do not know—I think that was in writing; the contract with the Bachelor was in writing, I think, same as the Butte.

Mr. O'BRIEN: I object to any evidence on the Bachelor contract on the grounds that it was in writing.

Question withdrawn.

Q. Who was present superintending and directing and advising in behalf of the owners of the Butte on the day that the tackling was made fast to her when she was partly hauled out and left on

246 the ways over night and also on the succeeding day, when she was finally hauled to the point on the ways where she was left?

Objected to as incompetent, irrelevant, and leading, and for the additional reason that the hauling out of the Butte was provided for by written contract, which was not put in evidence.

A. The captain was there and his mate.

Mr. C. D. O'BRIEN: I move to strike out that answer as not responsive.

I might make an explanation here that I was not a steamboat man, and when I commenced there I said to a number of steamboat men about there——

Mr. C. D. O'BRIEN (interrupting): I object to the witness proceeding to give a voluntary explanation not responsive to the question.

I object to it as not being called up by any question and immaterial and irrelevant.

Mr. J. H. DAVIDSON: Go on, Mr. Weaver; make the explanation.

A. At the time, not being a steamboat man, I said to these steamboat men that any suggestions that they might make to me would be thankfully received to further the work, and they did several times give me some instruction and help me in overlooking their work; it was a great help to me. They were all there and really all friendly, and they helped me along with the work whenever they could.

Q. State whether or not any of the tackle belonging to or off of these different boats was used in hauling out the various boats that went onto the ways.

247 A. Yes, sir; they were.

Q. When you left the Butte and the MacLeod the evening of the accident—when you left them there the evening that the accident happened—where did you go to, and where was you when you were sent for to go down, that the accident had happened?

A. I came to my home; then came down to my office; was about the town for an hour or two.

Q. Some distance, wasn't it—a mile or more from the boats?

A. Yes, sir.

Q. When you left there in the evening was there anybody there on the Butte in charge of her for the owners?

A. Their watchman, Charles Deitz.

Q. Mr. Deitz?

A. Yes, sir.

Q. Did the Government keep a watchman down there for the Eclipse—that is, the U. S. marshal?

A. Yes, sir.

Q. There was a watchman for each boat, was there?

A. Yes, sir.

Q. At the point where the boat was left on the ways the night of the accident had she passed up the incline and onto what you designate as the flat part of the ways, or was she still on the incline, not yet having reached the upper part of the ways that you speak of as being more nearly level?

A. I think she had not reached that point—just about up to it.

Q. Then had she reached the point at which you expected to block her up?

248 A. No, sir; she had not.

Q. Why was the Butte left on the incline and the McLeod dropped down before she had reached the point at which she was to be blocked up and repaired; what was the occasion for the haste?

A. To get the McLeod out of the water. She was lying there taking water; she was lying there and taking some water—that is, requiring pumping frequently—and we thought we could get her out of the water quicker this way than to have to fleet our blocks and to have to change them back next day.

Q. Had you more or less to do with steamboats such as were used

on the Upper Missouri the previous fall and winter in the way of furnishing materials and meeting with steamboat owners and talking with them in regard to the value of boats?

A. As lumber dealers we would have more or less talk with them in regard to furnishing material, and as directors of the ways Co. would go down there every day or two and look over the ground.

Q. Had you any knowledge of the value of these different boats that you mention in the fall of 1879?

A. Well, nothing more than comparing one boat with another. I would have the cost of the boat by common report and the cost when they were new, and then only as my judgment would tell me; nothing more.

Q. You have heard the different steamboat men talking about the value of their boats and cost of their boats, more or less?

A. Yes, sir.

249 Q. Captain Weaver, from your knowledge of steamboats and the condition of these different boats you have mentioned in the fall of 1879 what, in your judgment, was a fair, reasonable value of the steamer Col. McLeod at the time of this accident by which she was sunk as she lay at the foot of the way?

A. I would suppose, in the condition that she was then in, about $12,000.

Q. Had you made any careful examination of the condition of her hull or the machinery of the boat generally?

A. No, sir; I had not been aboard of the boat at all.

Q. Had you any understanding? You speak of an understanding that you was to haul her out; was there any understanding that you was to make her repairs and put her in good condition, or was that a matter which the owners of the boats attend to; was that a matter that the owners of the boats generally attended to?

A. That the owners of the boat would attend to.

Q. Was that generally the case with reference to these boats?

A. Yes, sir.

Q. The next day after the accident do you know whether or not they got up steam on the Butte for the purpose of running siphons or pumps for the purpose of raising the McLeod?

A. They did not.

Q. They did not?

A. No, sir; not until the first of March, I think.

Q. Of the next year?

A. Yes, sir.

250 Q. Do you know how long Captain Johnson stayed here after the accident?

A. I do not.

Q. How long did Mr. Deitz stay here, the mate?

A. He stayed here all winter and went away in the spring.

Q. Was she hauled out the next spring onto the ways and repaired?

A. She came in on the flood. When the ice breaks the river rises, and we caught her on the rise and brought her into the ways with 5 feet of water under her.

Q. She was repaired there on the ways the next spring?
A. Yes, sir.
Q. Who did the repairing and was in charge of her?
A. The captain was here.
Q. Captain Johnson?
A. Yes, sir.
Q. Was you paid for hauling her out in the fall; and, if so, by whom?
A. If I remember rightly, we were paid all at once in the spring.
Q. Was you paid for hauling her out?
A. Yes, sir.
—. Who paid you?
A. The captain ordered his clerk to draw a check for me.
Q. Captain Johnson?
A. Yes, sir.
Q. Did he pay you according to the contract price?
A. Yes, sir; he paid me according to the contract price, and, if I might remark, was not a paying investment. I was about $500 short on the contract, which was really not a loss to me, but to the ways company.

251 Cross-examination by C. D. O'BRIEN:

Q. Is this ways Co. a corporation?
A. Yes, sir.
Q. Under the laws of the territory?
A. Yes, sir.
Q. Is their general office here?
A. Yes, sir.
Q. The ways were built by them—by the ways company?
A. Yes, sir.
Q. Did they own the ground they stood on?
A. No, sir; they leased it.
Q. They leased it?
A. Yes, sir.
Q. Do they still have the lease?
A. I do not know whether the lease was ever signed by the railroad company or not.
Q. Did C. S. Weaver and Company—that firm is composed of yourself and Mr. Munger, is it not?
A. Yes, sir; it was at that time.
Q. Is that company partnership still in existence?
A. No, sir.
Q. When was it dissolved?
A. The first of January, 1882.
Q. By Mr. Call coming in, and the concern is still known as C. S. Weaver and Co.?
A. Yes, sir.
Q. Mr. Munger has always resided at Duluth?
A. Yes, sir.
Q. He resided in Duluth during the copartnership?
A. Yes, sir.

252 Q. When did you (whenever I speak of you I mean C. S. Weaver & Co.) take charge of the ways?

A. They took charge of the ways in the fall of 1879.

Q. Prior to the hauling out of the boats?

A. Yes, sir.

Q. With what arrangements with the way Co. did they take charge of them?

A. As managers. I was to receive $5 a day for my time.

Q. Were C. S. Weaver and Co. to manage the ways for the ways Co.?

A. Yes, sir; and pay over any profit that might arise to the company.

Q. Was that arrangement in writing?

A. Yes, sir.

Q. Was it in the form of a contract?

A. Yes, sir; it was in the form of a contract.

Q. And what kind of a contract?

A. Was made in writing, headed lease.

Q. Where is that lease?

A. I think it is in our safe.

I would like to ask you to produce a copy of it or the original, if that can be done, after recess.

Q. Was that the first time in the fall that C. S. Weaver & Co. took charge of the ways?

A. Yes, sir.

Q. Now, did you—I mean C. S. Weaver & Co.—solicit the hauling out of those boats? Did you solicit the hauling out of these boats from these steamboat men, or did you give them notice that you were running the ways?

A. Well, I think they solicited from us.

253 Q. In the expectation that you would put the ways in repair and make the necessary preparations to haul out the boats?

A. Yes, sir; the ways Co. had invested there about $5,000, and C. S. Weaver & Co. were the heaviest creditors, and they received propositions from different parties to assume management and to see if we could get our money out of it.

Q. And was that to apply on your debt?

A. Yes, sir.

Q. You say you did put the ways in repair preparatory to the hauling out of these boats?

A. Yes, sir.

Q. The first boat that was hauled out was the Eclipse?

A. Yes, sir.

Q. Do you remember when she was hauled out?

A. No, sir; I could not tell you exactly. No, sir; I do not know.

Q. About how soon was the Bachelor hauled out?

A. Within a day or two.

Q. How soon after was the Butte hauled out?

A. The next day after the Bachelor.

Q. Now, Mr. Weaver, before you commence to haul out any of those boats they were ready to be hauled out—the navigation season had closed?

A. Yes, sir.

Q. Where was the Butte lying before you dropped her down to the ways?

A. Just above the ways; these three boats—the Bachelor, the Butte, and the McLeod—lay one just above the other; the
254 McLeod was the uppermost one, and I think that we had the Bachelor in front of the ways in position before the McLeod came there, leaving the Butte drop down a little way and the McLeod just above her.

Q. Who placed the boats in that position?

A. The officers of the boats.

Q. By whose direction?

A. I do not know.

Q. Did not they inquire of you where to place them?

A. As I said before, the officers of the boats placed the boats in that position and then dropped them down in front of the ways when we were ready for them.

Q. How long had the Butte been lying there before she was dropped down?

A. I could not tell you.

Q. Some time?

A. Yes, sir.

Q. She was ready to go on the ways on her part before you were ready for her?

A. Yes, sir.

Q. Was her crew on board of her when she was dropped down in front of the ways?

A. No, sir; not a full crew—two or three men.

Q. Who did drop her down?

A. I think the mate and one man dropped her down. He might have asked me for a man or two to help him.

Q. Was she dropped down when you told him?

A. Yes, sir.

Q. They would not drop her down until you were ready for her?

255 A. No, sir.

Q. I am talking of the Butte.

A. She was dropped down; they dropped the Butte down so as to be on time.

Q. What time of day was it when you commenced to haul the Butte out?

A. I think it was in the afternoon.

Q. How many men had you employed on her?

A. About 20.

Q. Who had charge of the work of hauling her out?

A. I did.

Q. Were you there personally all the time?

A. Yes, sir; I was there very nearly all the time.

Q. In your absence who had charge?
A. A man named Hazen.
Q. Who was he?
A. Foreman.
Q. He was your foreman?
A. Yes, sir.
Q. On the ways work?
A. Yes, sir.
Q. And the other persons in charge and directing the work were Weaver and Co.?
A. Yes, sir.
Q. You hauled her out the first day how far?
A. I think we hauled her about out of the water that first day.
Q. And the next day you hauled her out how far?
A. About 60 or 70 feet. Originally the ways were 200 feet
256 long and it took 800 feet of hawser to reach, as most of these hawsers are about 600 feet.
Q. Well, you hauled her out for a certain distance and then you would fleet the blocks, carry her then back further, and make a new setting of them?
A. Yes, sir.
Q. On that second day what time of the day was it when you got to the point where she stopped?
A. About 10 o'clock.
Q. She had not reached her berth on the ways at that time?
A. No, sir.
Q. How far was she below it?
A. About her width; perhaps a little more.
Q. Why did you not haul her to her berth?
A. Well, because we thought by hauling the McLeod out of water she would be less expense to the owners—they had to keep her pumped out—and because then when we did fleet the blocks we could haul them both at once with only one change of blocks.
Q. Then the McLeod was leaking so that it was desirable to get her out of the water as soon as possible, to save expense to the owners?
A. Yes, sir.
Q. Then you did not wait until the Butte had reached her berth, but hauled her part way and then undertook to get the McLeod out of the water?
A. Yes, sir; and but for high wind we would have got the McLeod out of the water that night.
Q. Was Captain Murphy, of the MacLeod, there at the time she was dropped down to the ways?
A. I do not know whether he was or not.
257 Q. Who did the suggestion come from to hurry up the hauling out of the McLeod and save expense to the owners?
A. It was the same understanding that had been talked about among the steamboat men and the captains at the levees.
Q. Was it talked over by Captain Murphy?
A. I do not remember at this time.

Q. Would not the captain be apt to take as much interest in the matter as one who had no interest in it?

A. Well, Captain Murphy is a man who does very little talking.

Q. Was he aware of the fact that the McLeod was being dropped down for that purpose?

A. Yes, sir.

Q. Was he aware of the necessity of her being dropped down for that purpose?

A. Yes, sir.

Q. And it made no special difference to you whether you hauled her out on that day or the next?

A. No, sir.

Q. You say it did not make any special difference to you?

A. No, sir; her leaking was a considerable expense to her owners, and it being cold we might have a sudden change of weather that might freeze the river up at any time.

Q. How much more work would it have taken to have hauled the Butte up to her berth before dropping down to the McLeod—how much time would it have taken?

258 A. Half a day for twenty men.

Q. Was it your intention to let your blocks stand where they were, haul the MacLeod out on the ways, and then make only one shift of the blocks and then haul the MacLeod to her berth?

A. It was a matter of convenience all around.

Q. Then in the position you left the Butte she was only stayed temporarily?

A. Well, temporarily stayed; was considered pretty strongly stayed.

Q. Well, she was there temporarily?

A. Yes, sir; as strongly as if she had been left in her position.

Q. Did you put hutchicks under her?

A. Yes, sir; she was stayed under her guard, at her bow, with a 10 x 12 stick of timber, perhaps 14 feet long; she was stayed at her stern by an 18 x 12 stick of timber—Norway pine; they were under her guard; and then amidships she had a stick of hard wood, perhaps 8 inches in diameter; then at her knuckle there was a series of props—8 or 9 short stays, perhaps 3 or 4 feet long, as might be; then all these were fixed down into the ground and some hutchicks nailed onto the ways to hold her in that position.

Q. Who dropped the MacLeod down?

A. The men he had at work—Hazen in charge.

Q. By your direction?

A. Yes, sir.

Q. And when she was dropped down to the ways she was left there until the next morning?

259 A. Yes, sir; we thought that she would be in better shape to leave her until the next morning than to take her then.

Q. Where was Captain Johnson; do you know where he was when you left the Butte on the ways and commenced dropping down the MacLeod?

A. He was down there during the day, and I think he was boarding at the Sheridan House; he was about there most of the time.

Q. Did you take the tackle off the Butte after you stayed her?
A. Yes, sir.
Q. Did you hitch onto the MacLeod with them?
A. No, sir.
Q. You did not?
A. No; left them there.
Q. The straps were on to her?
A. Yes, sir; the straps were ready so as they could have been put on in half an hour.
Q. You said when the MacLeod went down to Lincoln when she was coming back the captain hailed you and asked you where you should put the MacLeod. Did you tell him where to put the MacLeod?
A. Yes, sir.
Q. And that was at a point above the Butte?
A. Yes, sir; I remember that.
Q. She took that position by your direction?
A. Yes, sir; because I know Captain Murphy and I had a question as to whether we should leave her above or below the ways, and I thought we could drop her down the stream easier than
260 we could pull her up, in which I found I was in fault afterwards.
Q. What was the course of the river directly in front of the ways—what was the course of the current?
A. In right angles with the ways, nearly south.
Q. The current ran south?
A. Yes, sir; about south.
Q. In front of the ways it ran in a southerly direction?
A. Yes, sir.
Q. You say when you dropped the McLeod down it was blowing?
A. Yes, sir; a northwest wind; it was blowing in a northwesterly direction.
Q. Blowing freshly?
A. Yes, sir.
Q. How far did the ways project into the river?
A. About 10 feet, perhaps.
Q. A boat lying at the bank above or below the ways—was the water so that she would lie snug to the bank?
A. Yes, sir.
Q. About how high was the bank?
A. About up to the hurricane deck.
Q. If the MacLeod had slid below the ways could you have warped her up without difficulty?
A. Yes, sir; perhaps we would have considerable difficulty, but I think we could.
Q. How long do you think it would have taken to have done it if she had laid below the ways—how long would it have taken to warp her up?
A. Well, if the wind was blowing it would probably take 3 or 4 hours.
Q. Well, without wind?

A. Oh, well, we could have done it in half an hour.

261 Q. How near could you have laid her above the ways so as you could have dropped her down?

A. Anywhere. There was a good bank all the way for a quarter of a mile above her, so we could have dropped her down without any difficulty.

Q. And she could have laid either above or below the ways so as to have cleared them and been safe and in proper place, and could have been warped up or dropped down, as the case might be?

A. Yes, sir.

Q. In laying her in front of the ways did you lay her snug to the ways?

A. Made her fast to the bow only; just her bow was out.

Q. You say the Butte was thoroughly stayed, well stayed and fastened?

A. So considered by myself and others.

Q. To what, then, do you attribute her slipping off?

Objected to as immaterial and incompetent.

A. To high wind during the evening.

Q. State, if you know, what is the character of that wind.

A. Well, sir, it was a very strong wind. It was, I think, a western wind. I think it was so strong that it pushed the boat up the ways, and when it died away the boat slipped back of her own momentum and knocked away her props, tearing the guards off at the top.

Q. What was the incline of the ways at the point where she laid; slight?

262 A. Yes, sir; so that when we undertook to launch the boats we had to push them down; they would not go down of their own weight. At this time, you remember, the ways were thoroughly greased. They had been thoroughly greased, and she would slip more easily than she would ordinarily.

Q. They had to be pushed clear to the river?

A. Yes, sir; they would not go with force enough so that they floated when they first struck the water.

Q. Who gave you notice first of the accident?

A. My foreman, Mr. Hazen.

Q. Was he there at the time of the accident?

A. No, sir; one of the workmen up there came from the river and told me.

Q. Were some of your workmen there when it happened?

A. Well, I could not tell you.

Q. Do you know of anybody that saw the accident?

A. Captain Mason was aboard the Bachelor. Deitz was aboard his own boat. I do not think there was anybody outside. It was a cold, stormy, and blustery evening.

Q. When you got there was the MacLeod sunk?

A. Not down; she was sinking when I got there.

Q. Was she in her position at the foot of the ways?

A. No, sir; well, her bow was sunk very near the bank, but her stern had slid a little into the river.

Q. But she was floating?

A. Yes, sir; she was floating all the way. She simply lay swinging in against the bank as the wind dropped her in, being fast at the bow.

Q. Do you mean to say she was swinging with the current?

A. The wind would blow her in pretty nearly against the bank. As the Butte came down the stern would swing, but the bow
263 would not, as the weight of the boat in the current would keep her against the bank.

Q. She was lying there with her stern in the current on the bank?

A. Yes, sir.

Q. Where was the Butte when you saw her the day after the accident?

A. She had dropped some astern and lay her bow against the boilers, perhaps a little forward of the MacLeod.

Q. Lying side by side?

A. Yes, sir.

Q. Was she floating?

A. Her bow was.

Q. Were any of the upper works of the MacLeod crushed?

A. I think not.

Q. Was she stove in in any way by the Butte?

A. That I do not know.

Q. As far as you could observe?

A. I could not observe that she was stove at all. I am not certain whether you could or not. I am not certain at this time.

Q. You do not remember seeing any holes crushed in her by the Butte?

A. No, sir.

Q. The next day you got the Butte off?

A. Yes, sir; we dropped her back below the ways.

Q. Did you have to push her off the ways?

A. I went up to get the railroad transfer. I went to get the railroad transfer to come down and pull her backwards, but before I got up there some one hailed me and said she was afloat, and
264 so I think she was pushed off by the line from her capstan; warped off stern foremost.

Q. What was the condition of the MacLeod when you got there in the morning?

A. She was out of the water as far back as her cabin stairs, but I know there was water over her deck; she was an open-hold boat.

Q. And the Butte was lying away from her?

A. In the morning she was lying against her; they were in the position that they were in at the time of the accident, during the night.

Q. Did you discover any indications of breaking the next morning?

A. No, sir; there was more there discussing where she was hurt;

I heard some one say that they thought her knuckle was — open by the pressure on her sides; that, of course, was only a theory.

Q. Then there were no evidences of breaking or collision with the Butte?

A. No, sir; my idea is that the weight of the Butte coming down against her was the principal cause of her sinking.

Q. Mr. Weaver, give us your judgment about the slope of that incline from the river bank to the water—give us, in your judgment, the incline of the ways.

A. After the incline went into the water (interrupted)——

Q. What is the slope? Give us your judgment, your best opinion.

A. I do not know the angle.

Q. Your best judgment.

A. I should say, perhaps, one foot in 8 or 9 feet; I am not
265 certain; that is my best judgment, to the best of my recollection, at the present time.

Q. The MacLeod laid right at the foot of the ways?

A. Yes, sir.

Q. Fastened by the head only?

A. Yes, sir.

Q. The natural result of an incline of that kind by the Butte slipping down there would be to swing her out into the river?

A. The stern of the Butte went first, so I am told.

Q. I do not want that.

A. Well, the evidence went to show by the lay of the boat that the stern of the Butte went first and crowded her out.

Q. Both of them were in the same direction?

A. Yes, sir. The stern of the Butte went first, and that striking the water first the stern of the McLeod gave way before it, and the Butte taking water at her stern had a tendency to draw her backwards.

Q. To draw the Butte backwards?

A. Because the pressure would be angular.

Q. The effect on the MacLeod was to push her into the stream?

A. Yes, sir.

Q. There was no pressure downwards on her; it was a side pressure?

A. There would be a down pressure on the bow. You understand that the Butte was higher than the MacLeod, and her pressure would be downward on the bow to a certain extent.

266 Q. The Butte, then, did not lay on top of the MacLeod at all, but shoved her out into the stream?

A. Yes, sir; but the pressure out into the stream and the pressure on her head line would bring a downward pressure on the MacLeod.

Q. No part of the Butte lay on top of the MacLeod?

A. No, sir.

Q. You were there the next morning when they eased the Butte off and dropped her below?

A. Yes, sir.

Q. Was the MacLeod then floating?

A. No, sir.

Q. How deep was she sunk—in what depth of water?

A. 7 feet forward, ordinarily.

Q. Have you any idea? I mean of your own knowledge.

A. 7 feet forward and probably a foot more aft, for the reason that they commenced to bulkhead her right round her stanchions, and nearly all the way that 2 x 8 material would come above the water line.

Q. You say she was an open-hold boat?

A. Yes, sir; no deck after her boiler.

Q. Were her boilers out of water?

A. Yes, sir; at that time.

Q. Machinery?

A. Yes, sir; except part of her engine was down on the floor beams.

Q. The Butte was clear away from there?

A. The next morning; yes, sir.

Q. What, if anything, was done with the MacLeod that day?

A. Nothing, except took off some little stuff off from her rigging and spars.

267 Q. Any effort made to raise her?

A. No, sir.

Q. Was she lying right off the foot of the ways?

A. Yes, sir.

Q. When, to your knowledge, was any effort made to raise the MacLeod?

A. Within two or three days Captain Murphy commenced to put a bulkhead around the stanchions, and I think he got some pumps made, and the water dropped a little, so that there was no water on her deck forward of her boilers, and they were looking for the diver here every day, and there was no effort made to raise her until that diver came.

Q. When was that?

Q. I should say it was between two and three weeks, to the best of my recollection.

Q. In the meantime had the river frozen over?

A. Yes, sir.

Q. So that there was no effort made to raise her until two or three weeks after the accident?

A. I do not think there was.

Q. Was there any attempt to haul her out?

A. No, sir.

Q. Did the Butte lie below the ways all winter?

A. No, sir. Some time after there was a rise, and we hauled her up where there was water enough between the shore and the MacLeod to pull the Butte in, and made two attempts, one on Thanksgiving Day, that we hauled her up nearly, but found that we could not, and once after that the river was still higher, and we tried again.

Q. About when was that last attempt made?

268 A. Three weeks after the accident.

Q. River had not then closed?
A. Yes, sir; but we had cut the ice.
Q. Who made those two attempts?
A. I did.
Q. Weaver and Company?
A. Yes, sir.
Q. Then after the last attempt you let her lie where she was?
A. We dropped her back a little ways so that she would not touch the MacLeod. I think that was at the suggestion of some men at work on the MacLeod, as well as the mate of the Butte.
Q. Deitz?
A. Deitz.
Q. In the spring, when the water came up, you did haul her out to the ways, did you not?
A. Yes, sir; we floated her in, but the suggestion of letting the Butte lay there was made, I think, because so that they might use her machinery in helping raise the MacLeod.
Q. They did use it afterwards?
A. Yes, sir.
Q. Left there for the benefit of the MacLeod?
A. To a certain extent, as a matter of convenience to both parties.
Q. How did it happen that the Butte came to be hauled out before the MacLeod; was it mere accident?
A. Yes, sir. If the MacLeod had been there first she would have been hauled out first, but each boat captain always prefers to
269 come out last. That is so when he gets his repairs done the man below him cannot hold him.
Q. Did Captain Murphy wish his boat taken out last?
A. There was nothing said with regard to it.
Q. He moored her so that she would go on to the ways last?
A. Well, he could not moor her any closer on account of these boats lying about the ways.
Q. Now, in speaking of watchmen on these boats, it is customary, is it not, that when a boat is laid up for the winter to leave a watchman on board of her?
A. Yes, sir.
Q. It requires the services of a watchman?
A. Yes, sir; generally, to keep little things from being carried away.
Q. That was the capacity in which this mate was acting?
A. Yes, sir; to a certain extent; he, I think, had not got his rigging all stored.
Q. Was doing watchman's duty on the boat?
A. Yes, sir; and then when he was not acting some one else acted in his capacity as watchman in his stead; he had two or three men to help him put away his rigging and fixing her up for winter quarters.
Q. How long had she been laid up before you dropped her down to the ways?
A. Not to exceed a week.
Q. Her crew was mostly gone?

A. Yes, sir.
Q. How long was it that her fires went out?
A. Probably the night that she struck the landing.
Q. Then her fires had been out for about a week?
270 A. Yes, sir.
Q. Was she dismantled in other respects?
A. I think not; I do not know.
Q. Did any of her men assist in dropping her down?
A. Yes, sir.
Q. Many of them?
A. I do not know. They dropped her there themselves.
Q. And then you took charge of her?
A. Yes, sir.
Q. Mr. Weaver, do you desire to be understood that Captain Johnson took charge of or supervised at the hauling out of that boat?
A. I would not say that. If Captain Johnson made us any suggestions with regard to the hauling out of his boat I heard them, undoubtedly.
Q. Mr. Weaver, did Captain Johnson have the direction; did Captain Johnson or Deitz have charge of or the direction, government, or control of the hauling out of that boat?
A. He did not control the men, but if he saw we were doing anything to the injury of his boat in any way he would speak of it.
Q. And that was the extent of his authority, then?
A. Yes, sir; to look after the hauling of his property.
Q. To see that you did not injure his property?
A. Yes, sir.
Q. By an affirmative act?
A. Yes, sir; we were liable to him only in case of gross carelessness.
Q. He was only authorized to interfere in case of gross
271 carelessness?
A. Yes, sir; and, as I have said before, I told him that any suggestions he might make would be very thankfully received.
Q. They are generally a valuable class of men in business?
A. Yes, sir; but Captain Johnson is not a man that makes many extra words.
Q. The same may be said of Deitz?
A. Yes, sir.
Q. And the watchman's duty on the boat was simply to watch the boat? He cannot order the taking off, or take them off?
A. No, sir; he cannot; but, as a man that had been mate on this river for ten years or more, he knew something about handling tackling.
Q. Was there any supervision made by Deitz or Johnson or any orders given by them with regard to where you left the boat that night and the manner in which you stowed her?
A. No, sir; no remarks were made with regard to it any more than that when she was stopped they said we wanted to fix her pretty solid. They were both there when the shores were put in.
Q. The stopping of her at that point that night was to enable you

to get the MacLeod out more quickly and to get her out of the water without making the necessary shifting of tackling which would be required to put the Butte in her berth?

A. Yes, sir.

272 Q. That was a convenience to you, as well as a benefit to the MacLeod?

A. Yes, sir.

Q. If this accident had not happened at that time how long could the MacLeod laid there without injury to herself without being hauled out, so far as the weather and ice were concerned; how long could she have safely laid there at the foot of the ways?

A. I think 5 or 6 days; the weather was, of course, getting cold and windy—getting into November in this country.

Q. What was the trouble with the MacLeod which made it necessary to haul her right out of the water, to put her in the ways so rapidly, to adopt this system with her that you did not with the other boats; what was the trouble with her that made it so necessary to get her out of the water at once?

A. No, sir; there was no trouble with her any more; there was — trouble with her anything more than that if we left their boat at this point we would not have any opportunity to put the other two boats on below it.

Q. Was there anything in the condition of the MacLeod?

A. No, sir.

Q. Mr. Weaver, I understood you this forenoon to testify that she was making water pretty rapidly, and that she had to be pumped out; had that anything to do with it?

A. Yes, sir; that is one of the reasons with the others.

Q. Had you ever been aboard the MacLeod from the time that she came into the levee up to the time of the accident?

A. No, sir; I had not.

273 Q. How long had she laid at the bank before the accident?

A. Two or three days, maybe; I cannot remember now, of course, exactly how long.

Q. Your best recollection?

A. Well, two or three days.

Q. How did you know she was making water?

A. By hearsay.

Q. From what sources?

A. From the carpenter and men that had come down the river on her, and do not know but what Mr. Edwards made remarks of that nature to me.

Q. He was the clerk of the boat?

A. Yes, sir.

Q. Mr. Weaver, what I want to get at is this, whether some of the officers—whether your information as to her leaking and pumping being done on her did not come from some of the officers of the Butte?

A. No, sir; I think not.

Q. Was not Edwards her clerk?

A. I do not remember anything of that kind.

Q. Whom did your information come from?

A. I do not remember; some of the men that came down on her probably; they worked for me and might have made that remark.

Q. While she was lying here at the levee state whether or not there was any pumping being done on her?

A. Yes, sir; I think there was some pumping being done on her, but did not see it.

274 Q. You did not see the operation of pumping going on — her while she lay here at the levee?

A. No, sir.

Q. Then how do you know she was being pumped out?

A. I know from hearsay. I do not know of my own knowledge.

Q. Did you take notice, while she was being dropped down at the foot of the ways, what her condition was?

A. No, sir; I did not go aboard of her at all.

Q. Did you take notice when she was moored at the foot of the ways what her condition was?

A. No, sir.

Q. And the next time that your attention was called to her was after the accident—when she had sunk?

A. Yes, sir.

Q. Did they ever get her out?

A. No, sir.

Q. Captain Weaver, you have testified that in your opinion she was worth about $12,000 at that time; you knew nothing of her condition?

A. No, sir.

Q. How badly she was damaged?

A. No, sir.

Q. You, of your own knowledge, know nothing about steamboat valuation?

A. No.

Q. Never built one?

A. No, sir.

Q. Do you not know the cost of what the repairs would be?

A. I could approximate the work.

275 Q. But you have no personal knowledge of your own as to the value of these boats?

A. Well, no, sir. I have worked on boats in times past, and know about what they expend on them when they repair them.

Q. Well, Captain, you do not consider yourself a competent judge of the value of a steamboat, either in a state of complete or partial wreck?

A. No, sir; I do not. I knew the MacLeod when she came here as a new boat, and this was the end of her second season, I think.

Q. Mr. Weaver, look at that paper and see if that is not a copy of the agreement that existed between you and the ways Co.

(Witness handed a paper in writing.)

A. That is, as near as I can recollect, a copy of the lease.

Paper referred to is hereto attached and marked "Exhibit A," and admitted by the proctors to be a true copy of the original contract between C. S. Weaver and Co. and the ways Co.

Q. Look at that paper and tell me if that is not a contract between you and the Butte.

(Witness shown a paper in writing.)

A. Yes, sir; that is the original contract.

Q. Between C. S. Weaver and Co. and the owners of the Butte?

A. Yes, sir.

Paper referred to is hereto attached and marked Exhibit "B."

Q. You performed the conditions of that contract in the spring, did you not?

A. Yes, sir.

276 Q. Hauled out the Butte and she was repaired by the owner?

A. Yes, sir; to the best of my ability. Well, we did not haul her out; the ice hauled her out.

Q. The operation of the ways company there and your C. S. Weaver & Co. were confined—that is, all you had to do was the hauling out of the boats and keeping them on the ways?

A. Hauling them out, blocking them up, and keeping them on the ways; yes, sir.

Q. And such repairs as were put on you did not undertake?

A. No, sir.

(Witness desired to state after recess, just before the continuation of the examination, that the paper requested him to be got he was unable to find, and that it is not in his safe, as he stated, and could not find it.)

Q. Mr. Weaver, have you talked this matter over with anybody—any person representing any of the parties to this litigation; have you talked over—I mean the matter of this accident?

A. I do not remember; I probably have; it has been discussed one way and another; not in a legal point, however.

Q. I do not mean in a legal way, but as to the facts?

A. Well.

Q. With whom have you talked them over in regard to the facts and occurrences there; who on the part of the libellants have inquired, and what have you stated in regard to the occurrences there to them?

A. I do not know as anybody; the fact of discussing the
277 point, as far as that is concerned, has been for the first four or five weeks; there was a good deal of talk about it.

Q. Has there been any conversation or talk on your part with the libellants or anybody representing them referring to the matter?

A. I do not remember anything; I presume I did with Mr. Wetherby discuss this point when the accident first occurred; I do not remember any particular occasion, but the probability is we did do it; I do not remember anything that was said in regard to it.

Q. Mess. Weathersby and Flannery were your counsel at the time it occurred?

A. Yes, sir.

Q. Are still your general counsel?

A. Yes, sir.

Q. They are also the local counsel for the libellants in this case; you understand it so, do you not?

A. I do not know; I have heard that was the case; they have said nothing to me with regard to it—that is, asked me any questions in regard to it.

Q. Has there been any discussion or conversation between you and the libellants or anybody representing them with relation to the liability of C. S. Weaver and Co. or the ways company in this matter?

A. I do not know as I care to answer that.

Q. Do you decline to answer that question?

A. Yes, sir.

Q. Why do you decline to answer it?

A. I will decline the whole question.

Q. You decline to give any reason for your refusal to answer the first question?

278 A. Well, I think I had better.

Redirect examination by J. H. DAVIDSON:

Q. Mr. Weaver, are not Flannery and Weathersby attorneys for Power Brothers generally outside of this particular litigation? Do you not so understand it?

A. I do not know whether they are or not.

Q. Mr. Weaver, Mr. Edwards, who was the clerk on the MacLeod, testified in his deposition (which has already been taken) that his boat returned to Bismarck and landed there above the ways on the 13th or 14th of November (I have forgotten which day, but I am sure it was one of those days), and that she lay here until the evening of the 17th, when the accident occurred. Now, if such is the fact—and she had been in a very bad condition, requiring constant or great deal of pumping—is it not probable that you would have known something about it, being down there and at work?

A. Well, no sir. The amount of pumping to keep afloat one of those boats when they are light is not a great deal. A man with a hand pump, such as you would use in your kitchen sink, would throw out water a great deal faster than they would take it in.

Q. Is — not the fact, Mr. Weaver, that most of these boats after the season of navigation on the Upper Missouri come to this port with more or less holes in their bottom, either bulkheads or otherwise, on account of rock bottom and difficulties of navigation during the season of the year?

A. Yes, sir.

279 Q. Then there was nothing that called your attention especially to the condition of the MacLeod over that of other boats, was there, as to her injuries?

A. No; nothing more than that one of the parties said that they saw a siphon on the MacLeod all the time.

Q. Do you not remember who reported that fact?

A. No, sir; I do not.

Q. Well, was it by anybody presented to you as a special reason why you should be in any hurry about hauling her out; that she was in such a leaky condition that it — necessary to get her out?

A. No, sir; it was not so represented by anybody.

Q. When the Butte stopped on the ways on the day of the evening on which the accident happened who was it that made the remark to you or in your hearing that you wanted to fix her pretty solid?

A. I think it was Deitz.

Q. The mate of the Butte?

A. Yes, sir; and Hazen at that time had most of the shores in, and was putting in more, until they supposed she was secure and that there was no possibility of her getting away.

Q. Was Captain Johnson there about her while these shores were being put in and the hutchicks being nailed on—looking at her and examining her fastenings and her condition?

A. Well, he was about the Butte, too; all the time about, he and Deitz both.

Q. In the process of making your straps fast and your tackling to haul her out and in the process of pulling her up the ways, did Captain Johnson or Mr. Deitz, either of them, from time to time make suggestions as to the slacking or tauting of this line or that
280 line or as to fixing her rigging in a different way, or as to any of the work that your men were doing?

A. I do not know as they did on that boat; they had spoke to me with regard to other boats. I do not know as they spoke to me of this one particularly.

Q. The master or mate there of each boat stayed by the work observing the manner in which it was being done, and all of them offered friendly suggestions from time to time as they thought ought assist you in making the work easy and secure?

Objected to as leading and immaterial.

A. The captains of these boats boarded at the hotel; they would come down in the morning after breakfast; usually walk down and stand about until about dinner time, and anything they could see to further along the work or any suggestion that they might make they made them, and we heard to them usually if we saw them practicable.

Q. Was it fully understood or not by the masters of these different boats and the men in charge of them that you was not an experienced man in hauling out and handling vessels on ways? What are the facts in reference to that, and particularly with reference to the owners of the steamer Butte as represented by Captain Johnson and Deitz?

Objected to as leading and immaterial.

A. They knew that I was not a steamboat man and that was my first attempt at handling steamboats.

Q. In the process of hauling out the Butte, if Captain Johnson or Mate Deitz were present and had ordered you for any reason
281 to stop pulling on her or to do anything that in their judgment seemed to be necessary for the safety and security of the boat, would their authority in any way been recognized by you?

Same objection.

A. I think you overdraw that word "authority." Steamboat men are like other men; they do not like to be driven. If they had come quietly and made a suggestion that such a thing is wrong I should probably have heard to it. If I were moving a house for you, for instance, and you saw something was going wrong—that is, you saw that we were going to crack the plaster—you would request me to go and look at that the same as they would with reference to their boat. A question of that kind did not come into the minds of any of them. We were all working together and all good friends and had been so for many years.

Q. I understand that the matter there was wholly friendly and that you was performing to the best of your ability a work with which you were not familiar by long experience, and that these men were old and experienced men, were representing the owners of the Butte, and the point is whether their suggestions would have sufficient weight with you to have influenced your method of conducting that particular work or not.

Objected to as immaterial.

A. Well, I have been in the habit of acting on my own judgment for several years, and I should probably have looked over the case then if it was a matter of dollars and cents to me or the
282 ways company whether I stopped or not. The weight of the words of a steamboat captain representing the ownership, of the amount of money there is in a boat, would have, of course, large authority and should be listened to, but the question whether he had authority to stop me or not would be quite a question. I am not prepared to answer definitely whether it would or not; have not thought of it.

Q. You said in your cross-examination that the men on the Butte dropped her in front of the ways?

A. Yes, sir.

Q. And if you rendered any assistance—if you furnished any men assisting you—it was a voluntary act?

A. Yes, sir. I think if you look over that contract you will find they were to put her in front of the ways.

Q. The parties who remained on board the boat in the capacity of watchmen, who are in charge—did they do anything in the winter time about the boat in the way of preparing her for the spring repairs—getting ready?

A. Yes, sir; they usually did. Deitz came down as mate; stayed on the boat all winter; went out as mate in the spring. Whenever

it was necessary to do anything for the boat he went and did it and employed men to do it.

Q. Did he sleep on the boat?

A. Yes, sir.

Q. Was his cooking done on the boat?

A. On the boat, I think. If he left the boat he placed some one of his friends on it—one of the other watchmen—to look after his boat while he was gone.

283 Q. In the contract between Weaver and Co. and the owners of the Butte I find these words: "That the party of the first part may then place said boat in the river, first giving three days' notice to the party in charge on board." Who was to be the party in charge on *boat?*

A. Whoever was put there by the owners.

Q. The contract does not say the owners shall leave some one on the boat in charge of her; excepting this reference was there, outside of this contract, any understanding that some one was to stay on each of these boats in charge of them?

A. No, sir; it was the common custom; a man would not leave a boat worth 10 to 20,000 dollars down here on this levee without somebody to look after it; I think no insurance company would insure it, either.

Q. It was the custom, then, for some one always to remain with these boats all through the winter, watching them and taking care of them?

A. Yes, sir; usually some man of considerable responsibility.

Q. You have stated that there was nothing done to raise the MacLeod immediately after she sunk and for some two or three weeks, until a diver reached here; what was the condition of the water and the temperature of the water as to the possibility of men without the usual appliances exploring her leaks and putting tackle under her?

A. Well, the temperature of the water would not have so much to do with it as the thickness, for a man cannot see much through the Missouri water until after it was settled.

284 Q. Well, could anything have been done to advantage until the arrival of the diver to go down and ascertain her injuries and assist in the placing of the necessary apparatus under and about her to assist in raising her?

A. I am not a practicable steamboat man, and I do not know whether it would be proper for me to say.

Q. You say that the pressure of the Butte had a tendency to push the stern out in the middle of the stream while her bow was held in shore by the lines?

A. Yes, sir.

Q. Had the Butte any nosing or guard around her bow forward part?

A. Just the nosing.

Q. Did that nosing, as it slid down the way, go above the guard or deck of the Butte or below it?

A. It went above it.

Q. Well, then, was there any of the weight of the Butte in the morning when you went down there resting on the bow of the MacLeod, tending to press her down at such times when her lines were slack?

A. I think she had no line out.

Q. I mean the MacLeod line; you said she was made fast by two lines.

A. These lines were never slack.

Q. I say now in that possibility, being held to the shore by these lines and the Butte sliding down on her, with her nosing over the bow of the MacLeod, did it not press the MacLeod into the water?

285 A. It did at first, but after she was on the bottom I do not know how much pressure there was against her. It would have a certain tendency to hold her down.

Q. In the morning was a part of the Butte still resting on the ways so that she did not float clear of them? Was a part of it on the MacLeod?

A. I think she did not rest on the MacLeod. The MacLeod laid off from her and she was held to her place by some stanchions.

Q. Do you not remember whether there was not a spar. rigged on the MacLeod and set on the outside of her at her bow so as to hold her up as much as possible?

A. After she began to go under.

Q. How long was that after the accident?

A. About a week.

Q. What was the effect of this cutting under that you speak of, as to breaking down her bows and throwing her out of shape?

A. It would have a tendency to break her hog chain and throw her out of shape.

Q. You speak of a wind in the evening; from what point of the compass was the wind blowing?

A. It was a westerly wind.

Q. Blowing from the west or northwest?

A. Yes, sir.

Q. Then as the ways were constructed that would have a tendency to blow the boat on the ways?

A. Yes, sir.

Q. At this point is it not common for the wind to lull about sundown, along in the evening, ordinarily?

A. Well, sir; that is pretty hard to say; sometimes it does and sometimes it does not.

286 Q. What is your recollection as to the wind on that particular day, when you quit work, as to whether it continued to blow without, about the same strength and velocity, in the evening when you quit work as it did in the afternoon when you were dropping her down?

A. I do not know whether it dropped any before, but I know it blowed much harder about 7 o'clock.

Q. Have you any knowledge of the size of the Butte as to length—about how long she was?

A. She was about 180 or 190 feet.

Q. About the breadth of beam?
A. 34 feet, I think; I am not sure of that.
Q. Any idea or recollection about what her tonnage was?
A. I have it over in my books; do not remember now.
Q. State whether it was above or below 500 tons.
A. Below.
Q. It was below 500 tons?
A. Yes, sir; I have a list of the tonnage of nearly all the boats on the river, taken from the custom-house office.
Q. When Robert Hazen left the Butte to go to the MacLeod and assist in dropping her down to the ways he completed the shoring of her and fastening of her to keep her in her place on the ways?
A. Yes sir; he had.
Q. Was Peter Sashback a carpenter that assisted about that work?
A. He was not a carpenter; he was an old steamboat mate.
287 Q. Did he act in any capacity but as assistant to Tom Hazen about the work?
A. He was; yes, sir; Tom might say he did; he always attended to the bow of the boat; and this Peter Coller, who was another steamboat mate, usually took the lines towards the stern, they being more familiar with the rigging than ordinary workmen and generally got a little more pay than others.
Q. Do you know positively that there was a lease of that ground to the ways company, or was it a verbal understanding?
A. No; there was one drawn up. I do not know whether it was ever signed by the president of the road or not.
Q. On grounds supposed to be owned by the railroad company?
A. Yes, sir; there was a clause among the papers granting permission; I think Mr. Flannery drew up the lease and agreement.
Q. You do not know where that is?
A. I do not know whether it was ever signed by the railroad company.
Q. You say this was an incorporated company?
A. Yes, sir.
Q. Who were its officers?
A. James A. Emmens was president; there was D. I. Bailey, Robert Oder; they were directors of the company. R. Marshall.
Q. How much was the stock of the company? How much was the capital stock?
A. At first twenty-five hundred, and afterwards increased to $5,000.
Q. Do you know whether the stock was all subscribed and paid?
288 A. It was not. The first stock was subscribed and mostly paid up, but after that capital was used it completed the ways; it left nothing for the machinery to do the work with; then the capital stock was increased, but there was none of the stock sold.
Q. Was there a meeting of the stockholders—ever a meeting of all the stockholders of the company?

A. There was. The stockholders had an organization, and there was a legal meeting of the stockholders when this capital stock was increased, which I think took two-thirds of all the stock subscribed.

Q. Was you a stockholder in the company?

A. Yes, sir.

Q. Did you ever get your certificate of stock?

A. Yes, sir.

Q. Was it issued to all the shareholders?

A. I think it was. I presume it was. All those that paid up had that as their receipt.

Q. What was done with this additional stock—$5,000—money realized from the sale of that stock?

A. Never was any sold.

Q. How much was this company indebted to Weaver & Co. at the time you made this lease or contract with them which has been put in evidence?

A. About $1,700.

Q. Has that indebtedness ever been paid to Weaver & Co.?

A. No, sir; not all of it; a certain part of it. There was a meeting of the stockholders called, and those that did come ordered the material sold to apply on the indebtedness, and Weaver & Co. put in and bid for the material and appurtenances left on hand,
289 and the directors looked over the property and accepted their proposition to buy.

Q. And you were paid then by crediting the company so much on account of debt that it owed Weaver & Co.?

A. Yes, sir.

Q. Did you have the notes of the company or any other evidence of indebtedness?

A. Yes, sir; hold the notes yet, and we will sell them for a slight discount if you care for investment.

Q. When was the last meeting of the board of directors of this company?

A. About a year ago.

Q. About a year ago?

A. Yes, sir.

Q. Who is secretary of the company?

A. F. J. Call.

Q. Is — the Call who is now of the firm of C. S. Weaver & Co.?

A. Yes, sir.

Q. Has the company any property?

A. No, sir; it has not.

Recross-examination by C. D. O'BRIEN:

Q. With the appliances which you in your ways and with the character of the men you had in your employ, did you regard yourself as competent at that time to haul out those boats?

A. No, sir.

Q. You do not now, do you?

A. No, sir; although I would not do it again.

290 Q. If the bow lines of the MacLeod had been slacked or if they had come apart she would have floated down the river, would she not, in your judgment?

A. I do not know.

Q. When you saw them the sterns were touching, but not the bows; the bows were not touching?

A. They were 30 or 40 feet apart; the bow of the Butte was amidships of the MacLeod—opposite the boilers; in contact with the MacLeod, opposite the boilers.

Witness fees, $1.50; paid.

BARNEY FLYNN, of lawful age, being produced, sworn, and examined on the part of the libellants, deposeth and saith:

Direct examination by J. H. DAVIDSON:

Q. What is your name?
A. Barney Flynn.
Q. What is your age?
A. I am about 35 years of age.
Q. What is your occupation?
A. I am a laboring man.
Q. Do you live in Bismarck?
A. Yes, sir.
Q. What is your occupation?
A. I am working for the railroad company—in the freight office.
Q. How long have you lived here?
A. Three years now; have been on the river this 9 or 10 years.
Q. Where was you employed in November, 1879, at or about the time the Col. MacLeod was sunk near where the ways
291 were?

A. I was here in town—right here in the street when the alarm was spread that she was sunk, but in that month I was working on the ways.

Q. In whose employ was you?
A. Weaver's.
Q. C. S. Weaver & Co.?
A. Yes, sir.
Q. Was you down there at the ways that day?
A. Yes, sir.
Q. What was you doing that particular afternoon?

A. I believe I was laying on the timbers on the MacLeod—putting on the straps that afternoon.

Q. About what time of day was she dropped down from the landing to the foot of the ways?

A. In the afternoon between 3 and 5 o'clock, as near as I can get at it.

Q. Who dropped her down?
A. I think it was Bob Hazen.
Q. Foreman of C. S. Weaver and Co.?
A. Yes, sir.

Q. Was Charley Bagley the mate of the MacLeod there—the carpenter or mate on board of the MacLeod?

A. I do not recollect whether he was or not; I think he was; he might have been; I am not sure. I know that Bagley—he is a friend of Captain Lyon, here; he is a red-complexioned fellow; he was working on her. Whether he was——

Q. Well, Mr. Flynn, was you down in the hold of the MacLeod doing your work on her?

A. Yes, sir; because she was not decked over.

Q. She was an open-hold boat?

A. Yes, sir.

292 Q. How many hours were you on her that day?

A. Probably between 5 and 6 hours on her and on the shore about half a day. I was on her, anyway, that afternoon, working on her that afternoon.

Q. What was her condition as to having water in her hold?

A. It was perfectly dry there, beyond half an inch or an inch. He and a few other men were scooping her out, cleaning the hold—repairing her. I saw the men cleaning the hold—laborers that Murphy had on there.

Q. Was anything done about pumping her when you was there?

A. No water in her to pump.

Q. Was you up to where the steamer Butte was staying on the ways in the evening or afternoon on which the MacLeod was dropped down?

A. Yes, sir.

Q. How was she fastened to hold her on the ways that night?

A. I do not recollect. She had placed against her pieces of timber—planks braced up agin her and the ends stuck in the ground.

Q. And the other end against the knuckle of the boat?

A. Under the nosing of the boat.

Q. Under the nosing of the boat?

A. Yes, sir; nothing under the knuckle.

Q. Did you see anything of Captain Johnson and the mate Deitz of the Butte about her?

A. I see Deitz about the Butte; I do not recollect. I see Captain Johnson there about every day; do not recollect whether he
293 was there about that time or not. I do not recollect whether he was there that time or not; pretty sure he was there when the boat was hauled out, but could not positively say. He was around there off and on—him and Murphy and all the other captains.

Q. What was the condition of the atmosphere that afternoon as to wind—whether there was much or little wind blowing?

A. That day was about like to-day—pretty cold and dark through the day, and in the evening it blowed a little; do not recollect how hard.

Q. If there had been a remarkable high wind you would have recollected it?

A. Yes, sir.

Q. Was you down there that evening after the accident happened?

A. Yes, sir; I went down there with Hazen, who was boarding with me at the time.

Q. What time in the evening did you go down?

A. About 9 o'clock—between 8 or 9 o'clock, I should think it was.

Q. What condition did you find things in as to the Butte and the MacLeod?

A. I found that the nosing of the Butte was over the top of the MacLeod, and that she was filling with water. I think she was within about a foot of being filled.

Q. The MacLeod was?

A. Yes, sir; there was about the end of the outside guards out of water and the forecastle of her. When she run, when she
294 slid down, she run up on her and above her, down; bow of the boat was on the ground.

Q. You mean that the MacLeod had sunk to the bottom?

A. Yes, sir; yes; she was lying on the bottom, I think.

Q. Was she listed or was she lying level?

A. She was listed. They pulled the other boat off of her.

Q. Did anybody sound the water while you was there to see what depth of water there was at the bow of the MacLeod?

A. I saw them sounding several times.

Q. About what depth of water — there?

A. I suppose it was about 5 feet. I should remark about 5 feet.

Q. Was there any part of the stern of the MacLeod afloat or was it under water?

A. There was about 3 inches under water along the guard, on the inside guard, after the boilers, and at the boilers she was out of water for a week. We put on side planks on her.

Q. Was there anything done that night to remove the Butte from her position?

A. She was dropped back that night, if I recollect right.

Q. Who was in charge of the Butte that night you went down there?

A. I think it was Charley Deitz that was in charge of her. There was several, of course, taking care of her. She did not have only one line on her, and they were making her fast.

Q. Making the Butte fast?

A. Yes, sir.

295 Q. Was Captain Johnson there in the night?

A. I do not recollect anything about seeing Captain Johnson there that night.

Q. How long did you stay there that night?

A. I stayed there about half an hour.

Q. Was there any marine pumps or diving apparatus here or anything suitable to be used raising a sunken boat?

A. Not that I know of. I don't know how long after it was the diver came here; probably a month after.

Q. What time did you go down to the boats in the morning?

A. I was down there about 7 o'clock, anyway.

Q. Did you examine the ways where the Butte had laid; see the

condition that the shores were in or the props that had been against her?

A. Seen how far she was shored up.

Q. What was the condition of the shores as left there; what condition did you find them in?

A. They had slid out at the bottom—out of the ground and slid out.

Q. Had there been any footings at the bottom of these shores?

A. They were just put down in a small hole in the ground, probably a foot and a half deep, and blocks stuck down at the ends of the braces. I see the blocks there, and I guess that was all. I do not think that there was anything more than that. I know that there was no timbers, because they were making remarks. If she had been put against timbers—if she had been put against
296 them that it would have been that she would not have slipped. I heard Hazen give orders to have that boat fixed while he was dropping her down; heard him give orders to fix that boat—to put shores under her. I do not know why—how he fixed it—only just as I heard them making remarks the next day that the boat was not fixed to suit them.

Q. How many was there of these shores or braces that had been put against the boat in the morning that you say she had slipped at the bottom?

A. There might have been four or five short ones and long ones.

Q. Was Captain Johnson there in the morning?

A. I could not tell you.

Q. You do not remember?

A. No, sir.

Q. Was Charley Deitz?

A. I believe that Charley Deitz was there. He was watchman on the Butte at the time, or acting as watchman, so he must have been there.

Q. Where was you in the evening from six o'clock, the time you quit work, until you started down to the boat after the accident?

A. I went up and had my supper and came down town then, and was around on the street until Jack Lyons came up and reported that the Butte had slid down. I was around on the street.

Q. State about how much wind there was during that time as compared with what it was along in the evening before you quit work.

A. I do not think it raged a great deal. I recollect it was blowing some. I heard them talking about it the next day, whether
297 there had not been some sudden breeze more than where I was; I did not notice that the wind was blowing very hard; heard them talking about the wind striking her, and that it must have been blowing very hard.

Q. Well, now, how long did you continue to work down there after the accident or sinking of the MacLeod?

A. I expect about 6 weeks. I worked down there about all winter where the boats were and on the ways in the spring.

Q. Who remained in charge of the Butte during the winter?

A. Charley Deitz.

Q. About how long was it before they got a marine pump here and diver and went to work to raise the MacLeod?

A. Probably a month or two.

Q. In the meantime had the river frozen up?

A. Yes, sir; there was ice, because we cut — hole for the pump.

Q. Did you work about her when they went to raise her?

A. Yes, sir; we were sent to help her—all our crew.

Q. How much ice was there over her deck at that time?

A. There had been cut, if I rightly recollect, about two feet of ice, and they had cut it, and they cut it out of the engine-room, and then there was no ice over the hole.

Q. Was you there when they started their pumps?

A. Yes, sir.

Q. Did you do anything with her (the Butte), with her machinery, to try to assist in raising her?

A. Yes, sir; we raised steam on the Butte, and we had it on two or three days.

298 Q. Why did not they raise the MacLeod?

A. I guess there was too much mud to raise her, and there must have been some leak; do not know any other reason.

Q. Well, you was working about the Butte and the MacLeod. Was Captain Johnson or Mr. Deitz directing anything about the Butte—giving any orders or instructions in any way?

A. I could not say much about Johnson; Deitz was always there acting as boss for these fellows—back and forward through the daytime. I don't know as he was hired.

Q. He was bossing the job?

A. Yes; I do not recollect about Captain Johnson. I think Captain Johnson went away after the accident. I could not tell much about Captain Johnson.

Q. Who was in charge of her and bossing the job about the MacLeod after she was sunk?

A. Murphy.

Q. Captain Paul Murphy?

A. Yes; he had charge of and paid the men. I do not know whether he paid me something or not. I forget, but I believe he paid me something for working; do not recollect.

Q. Had you ever had any experience in working about ways where boats were hauled out before?

A. Yes, sir; I had worked a little on ways back and forward. I had been on that one until the last boat was off, in the spring, on that ways. I had been around ways in assisting before.

Q. What boat was on the ways that Mason was looking after? Was he looking after any boat?

299 A. Watchman on the Bachelor.

Q. Who paid you for your work the day of the accident and about that time?

A. Weaver did.

Q. Was Weaver there most of the time himself?

A. I guess he was there the biggest part of the time.

Q. About how much slope had those ways; was it pretty steep or slack?

A. Pretty good slope for ways about where the Butte was laying; it was a pretty good slope. As you came up, you know, there was a more gradual slope. She was lying at about the steepest part of the ways.

Q. At the steepest part of them?

A. Yes, sir.

Q. You say where the Eclipse and the Bachelor lay it was nearer level?

A. Yes, sir.

Q. How far was she from the Bachelor?

A. I do not know; I believe you could step from one right onto the other, if I am not mistaken—no; I think there was about 6 or 8 feet between them; there was a wheel arm thrown across to walk on.

Q. Any sticks or timber or anything across the top of the Butte that was used in making fast the straps to haul her out with?

A. All the straps were taken off and, I think, there was no lines fastened to the Butte at all.

Cross-examination by C. D. O'BRIEN:

Q. Who gave orders to drop the MacLeod down to the ways?

A. I don't know; the orders we took from Hazen.

300 Q. Who was it that gave orders to drop her down?

A. I believe he did; that I cannot say, positively.

Q. You assisted in dropping her down?

A. I was down around her and was laying timbers on her.

Q. How long did it take to drop her down from where she was?

A. Probably a couple of hours.

Q. How far was she laying above them?

A. About 100 feet—150 or 160 feet.

Q. How did it come to take so long to drop her down?

A. Well, you know you have to run the lines out and shove her out a little. It takes quite awhile to drop her down a foot or so at — time; it would probably take three hours. We had to spar her out from the shore. It would take three hours to drop her in front of the ways—a couple of hours, anyway.

Q. Was there any special trouble in doing it, as far as the weather was concerned, that you now remember?

A. Well, no; but that we had to take in lines; got a good many lines out, and dug holes under dead men to make fast the line.

Q. You say you had to spar her out from the shore?

A. Yes, sir.

Q. How far was she from the foot of the ways?

A. About 20 feet, I suppose.

Q. She lay twenty feet from where the ways came out of the water?

A. Yes, sir.

Q. How far would that be from the bank?

301 A. When you strike the ways you strike the bank. There was logs outside floating so that they would sink when the boat came on them.

Q. What time of day was it when they got the Butte to the place on the ways where they left? What time did you quit work on the Butte and leave her on the ways?

A. We worked on her that afternoon. We worked on her that afternoon—at least I think we did—and we got her fixed about—somewhere about—noon. We had her where we wanted her and the orders was to drop the MacLeod down to make her ready for the morning.

Q. You must have got the MacLeod down about 3 o'clock?

A. I think it was about, probably about, four o'clock or five o'clock when we got her where we wanted her.

Q. When you quit work on the MacLeod that night you left them in that position—both of them?

A. Yes, sir.

Q. How far was the Butte hauled out?

A. I think they intended to pull a couple or three boats out; do not know the distance.

Q. In your best judgment?

A. About 90 feet.

Q. Had she reached her berth where she was to stay for the winter?

A. I guess she had—no, I think I made a mistake; I think they meant to pull the boats together a little distance, now when you speak of it. They meant to pull the MacLeod up to her, and when they got—and when they would get—up above that gradual slope they would pull the two together.

302 Q. Was it not the trouble, Mr Flynn, that they reached the limit of the blocks and had to shift them?

A. Yes, sir; I guess that is so. There was some talk about that, anyway.

Q. Why did they want to get the MacLeod out so soon?

A. They were expecting the river to freeze and were in a hurry to get the boats out.

Q. Was she making any water?

A. I had heard talk of it and had been on and off her a couple of days, and the men was cleaning the water out of her, and when I was down in the hold was talking with some men and they were scooping the water out of her.

Q. Could they have been pumping without your knowing it?

A. Did not see anything in her to pump.

Q. If the pumps had been running you would have known it?

A. Yes, sir.

Q. If they were pumping her out once or twice a day you would have known it?

A. Yes, sir.

Q. And you say, to your knowledge, there was no pumps working on her?

A. Not unless it was going on at night time.

Q. Were you down all through her hold?

A. I was aft the boilers. I was under the boilers, I was.

Q. Well, did you see any leaks or breaks in her?

A. No, sir; I believe there was a leak in her, but I did not see it, in the boat, to amount to anything.

Q. You saw no evidence of any injury or leak in her?

303 A. No, sir.

Q. Was any bulkheads in her?

A. No, sir; except in the forecastle.

Q. If there had been any would you have seen them?

A. No; there might have been bulkheads in the forecastle and I might not have seen them.

Q. This night when the accident happened, was it dark or bright?

A. I do not think it was a very dark night.

Q. Was it moonlight, do you remember?

A. Do not recollect whether the moon was shining or not. We could see all around the ways—see good enough to travel.

Q. Did you go aboard the Butte or the MacLeod that night?

A. I was aboard both of them that night.

Q. Was her forecastle under water when you got there?

A. Oh, no; it was out of water.

Q. Was out of water?

A. Yes, sir.

Q. How was it aft the boilers; was she out of water?

A. There was no deck on her, I believe. One guard was out of the water and the other was aft of the boilers, and I should say that next day——

Q. I am speaking of that night now.

A. I think there—one of the guards seemed to be under water and the other was—I could see it was out of water. She was listed a little.

Q. Which way?

A. She was listed to the shore.

Q. Where was the bow of the Butte with reference to the

304 bow of the MacLeod when you went down there—side by side?

A. The bow of the Butte got aft the boilers of the MacLeod in the river down the ways and——

Q. The boats were touching you mentioned; the bow of the Butte lay alongside of the starboard side of the MacLeod—about the boilers?

A. Yes, sir.

Q. The top of her resting on her?

A. I think when I went down there she was setting on her; there was a big crowd of men there and I was hurried out to make fast the Butte or pull her back; could not recollect now; big crowd there.

Q. Was the Butte still on the ways or off the ways into the river?

A. Off the ways. The MacLeod did not seem to let her out. They had to push her back.

Q. The aft part of the Butte was still on the ways?

A. I do not believe she was. My best judgment was, she was lying under the ways; the MacLeod was still holding the Butte tight onto the ways.

Q. Was the Butte floating?

A. She was; all her aft part was floated, but the rest was leaning on the ways. She could be pushed off without much trouble.

Q. She was lying there just as if she had been lying at a levee?

A. Yes, sir.

Q. Did they push the Butte off to take the pressure off?

A. I do not think they did. The MacLeod kept gradually sinking and the Butte kept getting afloat, you see, and according as
305 the MacLeod sunk the Butte was getting afloat.

Q. As the MacLeod sunk did she swing out into the stream?

A. Her stern swung out some.

Q. You say that the aft part of the MacLeod was afloat?

A. I think it was on the bottom of the river—most out of water, anyhow; they sounded around it.

Q. They could not have swung her stern out if she had been grounded?

A. Well, I think she was on the ground, sinking all the time.

Q. Was she in about the same condition during all the time you were there?

A. No; she was getting lower down all the time, and soon they made the lines faster.

Q. Did they drop the Butte clear of her that night?

A. Yes, sir; I think they did.

Q. When the Butte cleared her did she swing into the shore any?

A. No, sir; she did not stir.

Q. And the next morning was there any of her out of water?

A. She had sunk down during the night under the water, and they were pulling on planks on her the next day, and there seemed to be about one inch of water on her decks.

Q. Were there any barges lying at the levee at that time—lying within reach at this particular time?

A. Not that I know of; there were some here. There was a few here, but not around there.

Q. Do they use barges on this river?

A. No; I only saw a couple here in my life.

306 Q. Any flats here?

A. There was one here; do not know where it was. It belonged to the railroad.

Q. Was there no attempt made to raise the MacLeod out of the water after the arrival of the diver?

A. No; I do not think there was. They had been working at her, putting planks around and taking stuff off of her.

Q. You have a good deal of experience on the river, more or less?

A. Well, have been steamboating quite awhile.

Q. Could they have not got some tackle on the MacLeod and got her out if they had gone about her right?

A. Well, if they could have got them under her they might have done it.

Q. Was it really necessary to have divers; could it have been done without them?

A. They claimed it was.

Q. Well, in your judgment, could you not have landed her up on the ways?

A. Yes; if they had lines on her they could have certainly hauled her some; certainly, but I do not think they could have hauled her quite up onto the ways.

Q. In your judgment, if they had put the tackle on her and with the machinery and appliances they had there, do not you think, in your judgment, they could have hauled that boat up onto the ways?

A. I do not believe with the tackle they had there they could have done it. If they had stronger tackle they might have. I know they tried to put chains under her, but whether they had a
307 chain under her or not I do not know, but they tried to put chains under her.

Q. Mr. Flynn, in your judgment, — they had gone and put tackle onto that boat, do you not think they could have lifted her so that with the assistance of the pumps they could have gradually emptied her?

A. Yes; certainly.

Q. Do you not think they could have pulled her towards the ways?

A. Yes, sir; if they had purchase there strong enough. I do not think it was strong enough.

Q. They did not use their purchase?

A. No, sir.

Q. A couple or three iron hawsers would have been pretty good tackle, would it not, as heavy as they use in this country?

A. Yes, sir; they had over three-inch.

Q. You speak about Deitz bossing the job; do you mean to say he did the bossing of the hauling out of the Butte?

A. No, sir; I do — mean to say he did.

Q. You mean to say he bossed the repair work and the watchman's work that was *down* around the boat?

A. Yes; and he used to do some bossing for the company so as to get along with the work, because he was there and a mate and handy about lines.

Q. But about the hauling out of this boat and putting her where she was and shoring her where she was shored; that was done by Weaver and Co.?

A. Yes, sir.

Q. Mr. Weaver himself was there most of the time?

308 A. Yes, sir; and when he was not there Mr. Hazen was there, who was his foreman.

Q. And when he was not there Mr. Hazen was, his foreman?

A. Yes, sir.

Q. About this shoring—was there any square timber used in shoring the Butte; was it planked?

A. I believe there was one piece of square timber and the rest was planked. There was a piece there like a jack spar.

Q. Was it two-inch plank?

A. No; I guess there was nothing else than 3-inch plank, if there was anything. There was some short pieces of 4 x 6's, short pieces, that they used for blocking, put down for short shores against the knuckles.

Q. Did you see any shoring there of 8 x 10 and 10 x 12?

A. I don't think there was any there of that description. There was one piece that might be 12 x 8.

Q. Any hard-wood shoring of 8 x 10?

A. No, sir.

Q. You say there was no hutchicks on the ways under the boat?

A. I do not think there was; do not recollect.

Q. Is it so that when they come to land the boats that they had to push them down; that they would not go down of their own weight?

A. A certain distance, and then they went of their own accord. They had to push them until they got to the gradual slope.

Q. Did they ever have to stay them—slack them down?

309 A. Yes; some boats we had to put a line on the bow, and in the spring of the year we had to shove them down; but the ways were in bad order there, but in the fall a boat would run herself.

Q. How long would it take to get her up to her berth with tackle on?

A. With good tackle we could have her out in a day.

Q. Suppose the MacLeod had been dropped below the ways, snug below the ways, would there be any trouble in the morning of warping her up; in the morning how long would it take to warp her up if she lay immediately below the ways?

A. A couple of hours.

Q. If she had laid above or below the ways she would not be hurt by those other boats slipping down?

A. Certainly not.

Q. Did you see on the MacLeod any breaking after the accident or any place where she was stayed by the Butte, apparently?

A. No, sir.

Q. See any breaking at all?

A. Not more than some stanchions broke.

Q. Broke before the Butte slipped down?

A. I think it was the Butte broke them.

Q. See any breakings on the MacLeod?

A. Yes; I think there was some things broke on her.

Q. Which side?

A. The side that struck the MacLeod.

Q. Which side was that?

A. The larboard side. There was some things broke on her, not to amount to a great deal.

310 Q. If the Butte or if the McLeod had her head lines out do you think the Butte would have shoved her into the river?

A. She would have hurt but might not have sunk her.

Q. You think the sinking, then, resulted from the fact of the pressure of the bow lines holding the MacLeod in her place and the pressure of the current acting upon her?

A. I think that when the Butte struck her she must have stove her so that she took water.

Q. Did not the guards of the MacLeod project over the——

A. I do not think there were any guards on her.

Q. You are satisfied that her forecastle and bows were clear of the water——

A. (Interrupting.) Was not under water when I went down that night.

Q. But these boats were stern-wheel boats, were they not?

A. Yes, sir.

Q. Did you see Mr. Weaver down there that night?

A. I do not recollect; I believe he was. It was so long ago I have forgotten about that.

Q. You are not in his employ, are you?

A. I am working for the Northern Pacific.

Q. You could not fix the date of this occurrence?

A. No, sir.

Redirect examination by J. H. DAVIDSON:

Q. Mr. Flynn, was there any hutchicks nailed on the ways under the knuckle of the Eclipse and the Bachelor before the day of the accident?

311 A. I do not think there was; none under the Eclipse at any time.

Q. Did you see any signs of any hutchicks having been nailed on the ways of the Butte the night before she slipped?

A. I do not think there was any hutchicks under her.

Q. If there had been hutchicks nailed on her could she have ridden over them?

A. No, sir.

Q. Would have been impossible?

A. Yes, sir.

Q. Mr. Flynn, how could they have put any tackle under her the next day *of* the accident — they had not a diver to go down into the water and fix it?

A. I do not believe it could have been done except they had a diver or some purchase to work by steam on the boat, and that they could not do it.

Q. There was not appliances here to handle or raise her at the time of the accident—that is, the next day—no marine pumps, no diving apparatus, no diver?

A. No, sir; there was not anything more than you see there now.

Q. You saw Captain Murphy in charge the next day doing what could be done?

A. Yes, sir; most all along I see him, I think; he took the boat into port and came down there occasionally and walked uptown again until after she sunk, and then he was there about all the time after the accident; he was down there about every day.

Q. This man Deitz was an old river man and had had experience in lines and blocks and tackle and all the apparatus there was being used there?

A. Yes, sir.

312 Q. Then where they were pulling out the Butte there were different gangs of men about there working, and Mr. Deitz was out among the men giving more or less instructions and assisting them, was he not?

Objected to as leading.

A. I do not know. I see him around about a sort of giving a hand, but do not know as the man had any bossing with the men on the shore, whatever he done around about the boat.

Witness fees, $1.50.

313 Capt. PAUL MURPHY, of lawful age, being duly produced, sworn, and examined on the part of the libellants, deposeth and saith:

Direct examination by J. H. DAVIDSON:

Q. What is your full name?
A. Paul T. Murphy.
Q. What is your age?
A. 28—about that.
Q. What is your place of residence?
A. I guess you may call it on the river.
Q. What is your occupation?
A. A steamboat man.
Q. How many years have you been engaged in steamboating?
A. About 18.
Q. In what capacity generally?
A. I have filled all, from roster up to captain, except engineer—captain, pilot, mate, watchman, deck hand.
Q. About how many years was you mating boats?
A. Let me see; commenced——
Q. Within 6 months.
A. 5 or 5 years.
Q. About how many years as master?
A. I commenced in 1873 as master.
Q. You commenced in 1873 as master?
A. Yes, sir.
Q. Where have you been steamboating for the last few years?

A. On the Missouri river.

314 Q. How many different boats have you handled on the Missouri river?

A. 6 or 7.

Q. Where was you and how employed during the season of navigation of 1879?

A. In 1879?

Q. Yes.

A. Well, I think that was the year I was on the Col. MacLeod.

Q. In what capacity?

A. Captain of her.

Q. What sort of boat was the Col. MacLeod—I mean as to power and capacity, age and tonnage?

A. Well, she was comparatively a new boat; do not think she was over a year and a half old; something like that.

Q. Know whether she was built especially for this Upper Missouri trade or not?

A. I cannot say; I know she was here; do not know what she was built for.

Q. How was she fitted for the Upper Missouri trade?

A. She was fitted and kept about the same as the average boat here.

Q. She was well fitted out?

A. Yes, sir; she was well fitted out.

Q. Where did she run from during that season while you was on her?

A. Between Fort Benton and here.

Q. Between Fort Benton and Bismark?

A. Yes, sir.

315 Q. Was you on her the last trip she made before she laid up?

A. Yes, sir.

Q. About what time did she get back here to Port Bismarck when she was laid up for the winter?

A. About the 14th of November.

Q. On her last trip to Benton how much load did she take up, or to Cow Island, wherever she went to?

A. She made a trip to Cow Island after she went to Benton. I could not tell you. I do not know whether there was over 75 tons on her or not. I do not know whether there was or not. There might have been more and there might have been less.

Q. Did she have much of a trip to Benton?

A. Well, not much of a trip to Benton. We put off considerable between here and there.

Q. What condition of repair was she in when she landed here the 14th of November?

A. What condition was she in repair?

Q. As to her hull?

A. Her hull was hurt some.

Q. Tell in what respect?

A. I think there was. I do not know how much of a break there was in her; several floor timbers broke in her; planks was shoved up between her floor timbers in places; probably there was about—I don't know; I guess I always said there was about 40 floor timbers. I do not think there was quite that many that was broken.

Q. Had she any bulkheads in her?

A. Yes; she had a kind of a bulkhead in there.

Q. Where was this bulkhead you speak of in her?

316 A. In the forward part of her.

Q. How much of her hold was open?

A. I do not know; probably 75 feet.

Q. Was it aft or forward of her boilers?

A. Aft.

Q. Forward of her boilers was it decked over?

A. Yes, sir.

Q. It was decked over forward of her boilers?

A. Yes, sir; from the aft end of her boilers forward it was decked over.

Q. And behind the aft end of her boilers she was open hold?

A. Yes, sir.

Q. And being the aft end of her boilers, she was open hold?

A. Yes, sir.

Q. Did you make any arrangement or contract with C. S. Weaver & Co. about hauling her out on the ways?

A. No, sir.

Q. Do you know of any being made, personally—any knowledge of such a contract being made?

A. No, sir.

Q. When you came back with her, after her crew was discharged, where did you lay her up on the bank with reference to the ways?

A. Laid her up two or three times the length of herself above ways; somewheres about twice the length of her, perhaps.

Q. What other boats were lying in the vicinity when you landed here?

A. The Butte.

Q. Where was the Bachelor?

317 A. I do not know whether the Bachelor was in the water at that time or not, but I do not think she was.

Q. How long did you stay with the Col. MacLeod after she was laid up?

A. Stayed with her until the 5th of April, excepting a little while that I was gone—a week or something like that that I was gone away.

Q. When you laid her up the 14th of November what condition was she in as to taking water and leaks, and what condition was she in in the days following until the night that she was sunk?

A. She was leaking some, but nothing very serious; that is, she was not in any sinking condition; she was leaking.

Q. Was she in any different or worse condition than she was in during the time that she was kept in making this last trip?

A. No; just about the same.

Q. How many men did it take to keep her free of water and in good condition?

A. I do not think that we had any hired especially for that purpose.

Q. Whose duty was it to keep her free of water?

A. The watchman at night time generally done it.

Q. Who was acting in that capacity after she was laid up?
A. Charley Bagley.
Q. Do you know how long it was necessary for him to pump her after she was laid up in order to keep her clear of water?
A. I do not think he had to pump her very often.
318 Q. Was he to remain on her for the winter?
A. Yes, sir.
Q. Do you remember what day you paid off your crew, except Bagley?
A. I think it was the 14th or 15th.
Q. Was you there when she was dropped down in front of the ways?
A. Yes, sir.
Q. Whose men did it—or who did it?
A. Weaver sent some men to drop her down.
Q. C. S. Weaver?
A. Yes, sir.
Q. Was you there when they hauled out the Butte about that day?
A. Yes, sir; I was there all the time.
Q. How far did they pull her upon to the ways the first day?
A. I could not say; I guess they got her out of the water.
Q. Then left her until the next morning?
A. Yes, sir.
Q. How far did they haul her up then?
A. I don't know; probably 50 or 60 feet; I do not know exactly.
Q. Have you any knowledge as to how they secured her on the ways?
A. No, sir.
Q. Was you down and about there until the MacLeod was dropped down to the foot of the ways during the evening?
A. I was right there on the bank looking at her.
Q. When did you go there?
319 A. When they all quit work I came up here to the Sheridan House and had supper, if I am not mistaken, and then went over to the drug store.
Q. What time did you hear of the accident in the evening?
A. Some time about 7 o'clock.
Q. What did you do then?
A. I went right down there as quick as I heard it.
Q. Describe the condition in which both boats were lying when you got there.
A. I think the MacLeod was lying on the bottom; the Butte was lying on the side of her between her and the ways.
Q. Was she resting on her?
A. Yes, sir.
Q. Well, she was right against her?
A. I do not know whether she was altogether off the ways or not.
Q. Was there many men down there when you got there?
A. Not many men when I got there; no, sir; but there was quite a number came down there a little after.

Q. Do you know whether Weaver was there when you got there?
A. I do not think he was there; I got there, I think, before him.
Q. You think she was on the bottom?
A. Yes, sir; I think so.
Q. Did you make any test of the depth of the water at her bow to see how deep it was?
A. Yes, sir.
Q. What was the result of that test?
A. 6 feet at her head and 8 feet at her stern.
320 Q. Was she lying level or listed?
A. Lying listed—lying pretty straight.
Q. How much water was over her deck on the forecastle?
A. Part of her forecastle was out of the water and aft of the capstan was under water.
Q. How much water was over the deck?
A. Well, I suppose in some places there was 4 feet—3 feet—there might have been 4 on the outside corner, but do not think there was more than 2 or 3 feet.
Q. Had her bowlines been slack—the MacLeod—when you got there?
A. I do not know that they were; I could not say whether they were or not.
Q. What was done after you got there?
A. Could not do anything that night; I came right up here and telegraphed to Isaac G. Baker, of Saint Louis; I sent a railroad telegram; it was in the railroad office; the other office was not open.
Q. What was it that you telegraphed him about?
A. Telling him his boat was sunk.
Q. Was anything done to get the Butte away from the MacLeod that night—to drop her out?
A. I do not know, I am sure. I don't think she was dropped from there. I do not know whether she was catched on the ways or not.
Q. How late did you stay there?
A. I think I must have stayed there—well, an hour; something like that.
Q. Then you came up and telegraphed the owners?

—. ——.

321 Q. What time next morning did you go down there?
A. I went back that night.
Q. You went back that night, did you?
A. Yes, sir.
Q. Stay there during the night?
A. I think I did.
Q. Was there anything further done that night?
A. No; I do not think there was.
Q. Anything that you could do?
A. No, sir.
Q. What appliances in the way of pumps or diving apparatus or divers or barges or other tackle was there here suitable for raising and saving a boat in the situation in which the MacLeod was?

A. There was not anything here at that time that we could get.

Q. What did you do next morning?

A. Well, next morning I do not think I done anything.

Q. Did you make any examination of the ways and shores—I meant the shores that had been under the edge of the Butte to hold her to bay—to ascertain how the accident had happened?

A. Well, I was around there and I saw where the shore had dropped out and plowed in the mud.

Q. Was there any appearance on the ways of hutchicks having been made and spiked on at the knuckles where the Butte had rested the previous night?

A. I think there was some hutchicks there, but do not know whether I examined them or not the next day.

Q. About how many shores was there there?

322 A. Pretty sure there was 4. Do not know how many more.

Q. How many were there at the bottom; had they been driven in at the bottom or had they slipped?

A. One of them looked as if she had rode over it and driven it into the ground. It must have gone down there, probably, ten inches—perhaps a foot—but it did not stay there; it came up again.

Q. And the others—had they slipped at the bottom and plowed the mud?

A. I guess they did not go down into the ground quite so much.

Q. What was the condition of the atmosphere on the day and evening before the accident as to wind?

A. It was a very nice day—cloudy day—if I remember right.

Q. How was it in the evening?

A. The evening of the accident there was a pretty strong wind blowing from the south.

Q. Was it strong enough a wind to have affected a boat like the Butte—to shake her up to amount to anything?

A. Well, no; I do not think it would shake any boat. I do not think it was quite strong enough to shake a boat up.

Q. Was it a common breeze or an unusual wind?

A. It was stronger than an ordinary wind, but it was a very frequent breeze in Dakota. It has its breezes every once in a while—very often.

Q. Was the McLeod, when you got there, so far sunk that you could not tell how badly she had been stove in, or could you tell how badly she was broken?

323 A. Could not tell; she was under water; the brakes were under water.

Q. How soon did you telegraph for marine pumps and divers?

A. I believe that I telegraphed it that night. I said that with the aid of a diver we could raise the boat, I thought.

Q. Was there any way, without a diver, that you could place chains or hawsers under her and lift her up and handle her with the appliances there at hand?

A. Not right there we could not.

Q. How soon after was there?

A. Well, I think when the pile-driver got through where they

were building that bridge across the river I made a contract with him to bring his pile-driver down and drive piles all around the boat, and that I thought we could raise that boat up. I made a contract with him next morning to bring his pile-driver down next morning—to come down next morning, and that if I did not receive contrary orders from Mr. Baker I would go to work and try to raise her with chains.

Q. Well, what was done by the pile-driver?

A. Nothing at all.

Q. Why did not they come?

A. Because I had orders to suspend all further operations until further notice.

Q. How soon did the diver get there?

A. I think it must have been, from the time she sunk, something probably in the neighborhood of three weeks.

Q. In the meantime what was the condition of the weather?

324 A. Between the time the boat sunk and the arrival of the diver?

Q. Yes.

A. When the boat sunk the weather was pleasant. It was as pleasant as this to-day. I do not think it was any cloudier the day the boat sunk, and I think it remained that way for a few days and then turned cold.

Q. Was there any ice floating in the river?

A. Not at that time. At that time there was no ice in — river anywhere. There had been before that. I do not think it was making any ice then.

Q. Did it make ice considerably before the diver arrived?

A. Yes, sir.

Q. What was the condition of ice over her decks and about her?

A. I think there must have been about a foot of ice; probably more.

Q. Well, what effort did you make to raise her?

A. When the diver came here we had a pump come here, I think. He got here about the same time he did. The marine pump came from La Crosse. The diver went down and examined the breaks and nailed canvass over all he found of them, and then we tried the pump. We sat the pump on the Butte and worked it from the Butte, which was one side of us, and got up steam on the Butte. We got the privilege to do so from Captain Johnson, and anything with regard to raising the boat, as he was very anxious to get the McLeod up, so as he could get his boat up on the ways, and

325 while we laid there he could not do it. Well, we put the pump on the Butte, but it did not seem to work very well on it, and I do not know — we cut ice out of her, but we received orders from Baker to suspend operations until along in March. He thought she would not be any worse in March than she was then, and that perhaps that we could do better then than we could now.

Q. Well, did you make any headway with the pumps after the divers had fixed the breaks? Could you get ahead on the water?

A. I do not think we gained much. I think we lowered the water on her about three inches; pump was not in the right place.

Q. How was it by this time as to temperature?

A. It was cold and freezing—about 30 degrees below part of the time.

Q. In the meantime, when the diver and pump was on the way, was there any snow storms to block the road between this and Saint Paul?

A. When the first diver came do not know that there was. I believe I do not know as to that.

Q. Where is the first diver?

A. He came from Saint Louis here—I think he must have come from Memphis.

Q. Was there a second diver sent here?

A. Yes, sir.

Q. Where did he come from?

A. From Saint Louis.

Q. Did you get any other marine pumps besides this one?

326 A. Yes, sir; had one from the underwriters in Saint Louis.

Q. And what was done in that time, in March?

A. We cut the ice up around the boats. He examined the leaks to see what he could find there, and he said he done the best he could, and I suppose he did. I could not tell; and we started both pumps working on her.

Q. Using the Butte machinery?

A. Yes, sir.

Q. Well, what headway did you make?

A. Well, the first time after we started with the pumps I think we lowered the water in the boat some. We raised her up at the stern about—well, probably, 15 or 16 inches.

Q. What prevented your finally raising her?

A. The Davidson pump let down on us. The other pump would not hold its own.

Q. What did you do then?

A. We had the pump fixed again. I think they sent a part of it up to the shop; got a man there; got a man from there and we fixed it. In the meantime, after we had raised the boat she sank down the next day farther than she was before, because as soon as we moved her off the sand the current got under and she settled deeper than she was before. Then we tried it again and the pump let go again the second time.

Q. Then what?

A. Then we gave it up.

Q. What did you do about getting her machinery and boilers?

327 A. Did not do anything; helped to get up nigger engines, some furniture, and such things; we had a chain around the boilers so that they could be hauled out in case we could not raise the boat.

Q. What wreckage could be taken from her was taken off of her?

A. Yes, sir; Isaac C. Baker took charge of that.

Q. Do you know what became of it?

A. No, sir; I do not know what became of it. I had a telegram to go on another boat, and McQuier, the diver, was sent here to raise the boat, so he said. I did not know anything about it, and I thought that there was no use for two bosses to be around there, so there was nothing for me to do. I left there on the 5th of April; the boilers were not out then. McQuier, I understood, pulled them out afterwards.

Q. Was there any marine pump, that you had any knowledge of, any handier or closer than this Davidson one at the time of the accident?

A. No, sir; none that I knew of. I suppose there was one at Saint Paul, and I believe I telegraphed there to find out. I do not know of any closer than that.

Q. Who came up with — P. S. Davidson pump, did you know him?

A. Captain Eldridge. Yes, sir.

Q. Do you know how long a time it was after the boat sunk that he got here with their pump?

A. I think it must have been about 3 weeks, perhaps more.

328 Q. From your experience in steamboating as mate and from your experience as master and from your general knowledge of Missouri river boats, do you know the value of such boats generally here at Bismarck and on the Upper Missouri, such boats as the MacLeod and other boats that were in this trade generally, the value of such boats?

A. I never set no real value on a boat; never had no transactions with regard to buying boats.

Q. From your acquaintance with steamboat men, the cost and the service of such boats, had you a knowledge of what such boats were worth up here in the trade that fall, 1879?

A. We all passed our opinion saying what a boat is worth, more or less. Of course, *I* at that time, when she sank she was not worth quite as much as she was a little while beforehand.

Q. From your knowledge of the condition of the MacLeod at the time she sunk, of the business here on the Missouri river, and of the uses that her owners had for her or were likely to have for her the ensuing spring, what, in your judgment, was a fair, reasonable value of the MacLeod at the time she was landed at the foot of the ways?

Objected to as not in good form for an estimate of value.

A. What I thought she was worth at the time of the accident?

Q. Yes, sir.

A. Well, I would not suppose the boat was worth over $9 or $10,000. I do not know that she was worth that.

Q. Do you know the value of the stuff that was saved from her or what was realized from it?

A. I do not.

329 Q. From your observation of the ways as they lay when the boats were being hauled out on them, state whether the incline was sufficient where the ways were greased as they were to haul out these boats for a boat to slide down of their own weight.

A. If a boat was let go I think one would come down flying pretty rapidly. I think that there was sufficient incline for that.

Q. You think there was a sufficient incline that if a boat was let go she would come down pretty rapidly?

A. Yes, sir—that is, after you give them a start. I do not think they would start themselves hardly.

Q. From your observation of the manner in which the Butte was hauled out and these other boats as you saw *it* from day to day and what you saw remaining of the shores that had been under her and the general condition of things, what was the cause of that accident?

A. I always said that it was because she was not properly shored.

Cross-examination by C. D. O'BRIEN:

Q. Before the Butte was hauled out on the ways was she dismantled—the Butte; was her machinery disconnected?

A. I could not say, because I did not examine her. I do not think she was.

Q. When you lay a boat up in the fall you disconnect her machinery, do you not?

A. Yes, sir; sometimes they do—that part of it which we have no use for.

330 Q. When you lay her up?

A. Yes, sir.

Q. Do you know whether the boat had been put into winter trim?

A. I suppose that she had.

Q. Well, to take her out in the spring she would not be in running order?

A. No, sir; not right away.

Q. Who was in charge? Who dropped the MacLeod down to the foot of the ways?

A. Weaver's men, I think. Weaver was there part of the time telling them what to do.

Q. Giving orders and directions?

A. Yes, sir.

Q. Where?

A. Standing on the bank.

Q. Did you have anything to say about it?

A. No, sir; I told Weaver and Co. that she was in their charge. I said, "She is entirely in your charge;" "I have not got anything further to do with her." He said, "I will look after her."

Q. Then you as master of the MacLeod had turned her over completely and entirely in charge of Mr. Weaver?

A. I understood there was a contract between Weaver and Baker when he commenced to drop the boat down, and I just surrendered all control of the boat to him.

Q. And so from the time that he commenced to drop the boat down she was entirely in the charge of Weaver & Co.?

A. Yes, sir.

Q. Was there anybody else there representing the owners?

A. No, sir.

Q. So you made a complete surrender of the vessel to Weaver & Co.?

331 A. Yes, sir.

Q. Did you give any directions or instructions or in any manner, shape, or form interfere with her after they dropped her down to the ways or in dropping her down?

A. No, sir. I even told the watchman not to lay a hand to anything; that Weaver & Co. were the responsible parties, and so that if anything went wrong the blame could not be thrown upon us.

Q. That watchman was this man Bagley?

A. Yes, sir.

Q. What is his first name?

A. Charley.

Q. You do not know whether he is the same man that testified in this case?

A. I did not see him here to-day.

Q. Was he the carpenter?

A. Yes, sir.

Q. What was the occasion in telling Bagley not to interfere? How did it happen that you told him that?

A. Because I did not want to be blamed for anything in case anything should occur in slacking up the lines. I told him that so that we would not be responsible for any accident that should occur to her.

Q. Was there any interference that called out that remark?

A. Yes, sir; he was going to help them, I think. He was going to help them in shoving the boat out from the bank. He is the kind of a man that works a good deal and tries to work.

Q. Likes to — charge of things?

A. No; kind of a busy man and likes to help everybody.

332 Q. When he was going to help them you forbid him from doing it?

A. I says, "We have nothing to do with it until they get her hauled out."

Q. How long did it take, then, to drop her down so as to moor her in front of the ways?

A. I should judge that it took them more than an hour, because there was a light wind blowing in on the shore.

Q. Were any of the crew of the MacLeod engaged in that or assisting any?

A. No, sir; neither on board nor on shore.

Q. Was there any necessity of moving that vessel down there to the foot of the ways and leaving her there over night?

A. Well, yes; I think there was.

Q. Was it good judgment?

A. Yes; I should say that it was pretty good judgment, I think, on their part.

Q. Had the Butte reached her berth on the ways?

A. Yes, sir; I think she was hauled up as far as she could go.

Q. Assuming that the Butte had not reached her berth on the ways and was only temporarily stayed, was it good judgment to move

the MacLeod down to the foot of the ways and leave her there over night?

A. Not if she was not properly shored it would not be good judgment.

Q. Mr. Weaver testified to-day that the Butte had not reached her berth at the time the MacLeod was dropped down, and that the reason that they had hauled her up to that point and stopped
333 there was for the reason that their tackle was too short, and wanted to take the MacLeod out of the water before they shipped their blocks. Now, if that was the fact, was it good judgment or was it safe to lay the MacLeod at the foot of the ways and let her lay there all night?

A. I should not say it was good judgment, if she was not properly shored, to drop a boat down in front of her.

Q. Did you examine the fastenings of the Butte to see if they were properly shored when you found they were going to lay there over night?

A. Well, I will tell you. When they got the boat up there I believe they were nailing some of those hutchicks up on the ways and putting these shores up, and I did not think that it was very safe to stand around that boat—that it might come down.

Q. In that condition of things did you think it was good judgment to lay the MacLeod there at the foot of the ways all night?

A. Well, they said they thought that she was properly shored, and, if so, I think it was good judgment.

Q. Was there anything in the condition of the boat (the McLeod) that made it necessary or desirable to them to get her out of the water as soon as possible?

A. Nothing, only danger of the river freezing up. It might have stayed there a week longer if the river did not freeze up.

Q. Was she leaking?

A. Yes, sir; some.

334 Q. Did they have to keep the pumps going?

A. Once in awhile; not very often.

Q. About how many times a day would they have to pump her out, the MacLeod?

A. As to that I could not say. It seems to me that they did not have anybody pumping except Bagley.

Q. About how many times a day would he have to pump her out, or anybody else?

A. I do not know; I could not say.

Q. More than once?

A. He would have to pump her out; the water was all catched inside of this bulkhead. It was very tight, so as to keep the water in there, and I think the pump was down there so as to keep the water from getting all over the boat.

Q. About how many times a day would they have to pump her out, in your best judgment?

A. I suppose sometimes they might pump her out when there was very little water in her, and then again when there was a foot or more in the bulkhead.

Q. Five or six times a day?

A. Never 5 or 6 times a day; I do not remember just exactly now.

Q. Captain, how far was that bulkhead located forward of the boilers, if at all?

A. It was located, I judge, about 15 feet forward of the boilers.

Q. Forward of the forward end of the boilers?

A. Yes, sir.

Q. Do you know where they put the braces in preparatory to hauling these boats up?

335 A. They put some braces down in her hull when they haul a boat out.

Q. Do you know where they were placed in the MacLeod?

A. There was not any placed in the MacLeod, because they never pulled on her at all. These are put in after the straps are put on her.

Q. If a man is down in the hold of the MacLeod—around the hold as far as under the boilers—could he readily discover that bulkhead?

A. If he was around under the boilers?

Q. Yes, sir.

A. I think not; I think there was a kind of a beam across the forward end of the boilers, but do not know whether there was or not.

Q. When was the Butte eased off—when was she swung off—the MacLeod; the next day?

A. I believe it was the next day she was dropped down.

Q. Did any portion of the Butte, when you was there—did any portion of the Butte rest on top of the MacLeod—any part of her?

A. She rested against the MacLeod.

Q. The bow of the Butte held the boat opposite the boilers of the MacLeod, did she not?

A. Yes, sir.

Q. Was she resting on her or merely laying alongside of her?

A. I do not think she was resting on the MacLeod, because there was not water enough to float the boat on that side. Still I do not think they could have got her off without sparring her off.

236 Q. After the accident did you notice whether or not the stern of the MacLeod had been swung out into the stream beyond what it was when she was moved there?

A. Yes, sir.

Q. How deep a boat was the MacLeod—how deep was she from deck to keel?

A. 3 and ½.

Q. When you saw her there, where her bow was out of water, her bow could not have rested on the bottom?

A. Yes, sir; because a boat's head is always deeper than amidships; they are always higher forward than in the middle of the boat.

Q. What would be her height forward?

A. Somewhere about 5 feet. The bow of a boat—when you can

stand up in the bow you have to stoop down to get through the middle; some are sheered 3 feet; some a foot and a half, and so on.

Q. Did you notice any breaks in the MacLeod—any breaks when she stove after she was sunk?

A. I could not say that I noticed any breaks.

Q. The next day?

A. I noticed that her deck, where the Butte had struck her, had, I think, as it was raised up a little bit and showed that the Butte had struck her. In that case it satisfied me that the Butte had struck her; that was in the forward part.

Q. How far from the bow?

A. Probably half way; about half way between the bow and the forward end of the boilers; probably about 15 feet from her stern or her bulge.

Q. Did you notice any staving on the Butte?

337 A. Yes, sir.

Q. Where was that?

A. I noticed her nosing forward, larboard side, broken off.

Q. Nosing is that flat piece that projects around the side?

A. Yes, sir; some call it fencing; that is what they call it.

Q. What was the size of the break in the MacLeod?

A. I don't know; 8 or 10 inches.

Q. Might there not be a break in that without affecting the hull?

A. Yes, sir; where I could not see it.

Q. Might there not be a break in the nosing that might not affect the hull?

A. Well, if it only broke the nosing it would not affect the hull.

Q. Where was the break in the MacLeod?

A. It was under her nosing.

Q. Was it in the hull?

A. Yes, sir; on her side, under the nosing.

Q. How much of a break was it?

A. That I could not tell.

Q. Saw some of it?

A. I could feel some of it; I think I saw some of it.

Q. Could you form any judgment of the size of it?

A. I would suppose that she had stoved her in about 20 feet.

Q. I mean from your observation.

A. I could not say anything about it.

Q. Was she listed?

338 A. She was, of course, listed some, but we call anything straight where she is not bulged up and down.

Q. Was she listed?

A. Well, the water was a little deeper on one side than the other.

Q. Did you resume charge of the MacLeod after the accident and control of her?

A. Well, I saw there was nobody else there trying to do anything and I thought that I would try to save the boat. Weaver & Co. gave her up, took rigging off of her, and abandoned her; they gave her up.

Q. If you had been allowed to proceed and if you had received

orders from her owners to commence operations could you have raised that boat?

A. I thought I could there at the time.

Q. Do you still think so?

A. Yes, sir; I have not gone back on that opinion yet.

Q. In your judgment, at about what expense could you have raised her if you had been allowed to go on?

A. Well, I do not know as it would run over $1,000; I do not believe it would. I think I could have got her up even with the water during the winter time and taken the ice out of her.

Q. Did you see the boat when she was dropped down to the ways before the accident?

A. I must have seen her—I must have seen her being dropped down to the ways, but do not remember anything about it.

Q. Who hauled her out?

A. Weaver and his men.

339 Q. You saw them doing it?

A. Yes, sir; they were the men, I suppose, to do all the work there.

Q. Do you know Captain Johnson, who was the master of the Butte?

A. Yes, sir; I know him.

Q. Do you know Deitz, the mate?

A. Yes, sir.

Q. Did either of these men have anything to say about the hauling out of this boat, to your observation?

A. They all had something to say.

Q. Did you have anything more to say with regard to hauling out of the boat than you did with regard to the hauling (interrupted) out the MacLeod?

A. I did not have anything to say about it.

Q. Did you see these men exercise any control with regard to the hauling out of the Butte?

A. Yes, sir.

Q. What was it?

A. I saw them around there helping, I thought it was, and giving suggestions and talking. I know that Charley Deitz was helping, because he was fixing the rigging for Weaver and Co.

Q. Was he doing any more than other captains was doing around there; was he doing about the same thing as the rest of the captains?

A. Well, all these captains are pretty talkative men. They are naturally looking around their boat to see that she comes out all right. Everybody wants to see their boat come out all right.

340 Q. Did you see them having anything to do with the shoring up of the Butte?

A. I thought that Deitz had something to do with the shoring down at the stern.

Q. In your estimate of the value of the MacLeod as she lay there at the foot of the ways did you include the machinery?

A. Just as she lay there; everything was on her.

Q. What, in your judgment, was the value of her hull at that time without the machinery or works?

A. Well, just the bare hull, taking the machinery off—just the bare hull—I have no idea what it would be worth.

Q. Give your best judgment.

A. I do not think I could come anywheres near it.

Q. You have made an estimate of her machinery and things?

A. Well, you take everything off of her and she would not be worth very much.

Q. I am trying to get the condition of her hull.

A. She would not be worth near as much.

Q. Was the hull of that boat worth $3,000 in the condition that she was in?

A. I do not know how to come at that.

Q. Well, a pretty good sound hull is worth something; was that hull worth $3,000 when that machinery was dismantled?

A. I do not think that that is a good and proper way to get at the value of a steamboat—to take the machinery off—the hull is not worth much.

Q. Well, I want that kind of value for two purposes. We
341 do not want to pay for boilers that we have not got. Captain, was that hull worth $3,000 in the condition that she was in when her machinery was dismantled—using her for a barge, or anything of that kind?

A. I don't suppose a man could get a man to pay that for her.

Q. A bulkhead in her—ten floor timbers broke out; just in that condition?

A. I do not suppose she was worth over three or four thousand dollars, taking the naked hull dismantled, but that is not the way to get at the value of a steamboat.

Q. We only want to pay for what we had and not anything more than we had got.

A. It does not make any difference to me who pays for it.

Q. How did they come to use the Butte's engines for the pump?

A. They did not use them.

Q. They used some part of the machinery. How did they come to use it for pumping out the MacLeod?

A. By the privilege of Captain Johnson; I think I asked him if we could not use her boilers.

Q. Did you not have to use the engine to get the water in the boilers?

A. No, sir.

Q. Whatever use was made of the Butte, of her tackle, was done by your request to Captain Johnson, and he gave it to you?

A. As a favor from Captain Johnson. He extended that courtesy to me to get the MacLeod out.

Q. Is it not frequently the case that if you go to work to
342 raise a boat immediately after she is sunk you can raise her, whereas if you let her lay from fall until spring you cannot?

A. Yes, sir.

Q. What were the difficulties that you met with in the subsequent

attemps in the spring—that the water had cut the sand out below her and that she head sunk down lower?

A. No, sir; it was after we had raised her off the bottom, then the current got under and cut the sand out from under, and then she settled down deeper, but I do not think she was any deeper in the spring than she was when she first sunk, except in the difference in the raise of the water.

Q. There had been mud settled onto her?

A. There is not any mud in this river in the winter time. It is as clear as crystal.

Q. Did they not put some braces under her bow to keep her from sinking lower? Did they not push some braces about her?

A. No; they put some chains around her. I put a chain around the bow of the boat. The current had cut about 25 or 30 feet of sand from under the forward part of the bow and we put chains around her head and set it up with jack screws in order to keep her head from breaking off in case the sand would give away. I cannot remember these things exactly; it has been so long ago since the thing happened; pretty hard to remember everything.

Q. Do you know Mr. Braithait?

A. Yes, sir.

343 Q. Do you remember what his occupation was at the time these boats were being dropped down?

A. No, sir.

Q. Did he ever have anything to say about it?

A. Not that I know of.

Redirect examination by J. H. DAVIDSON:

Q. After the boat had settled and lay straight on the bottom and there was a prospect that the river would soon freeze, was there any probability of any rise in the river or change of its status as to height before spring?

A. Well, sometimes here it rises over the ice in the winter time.

Q. Not very usual?

A. Most every year it rises a foot or half a foot over the ice, especially along the shores and where the ice won't come up.

Q. Had you advised Baker & Co. at Saint Louis, after she was sunk, that she was laying straight and in fair condition?

A. I told him that I thought that we could raise her; thought that we could raise her.

Q. As a matter of fact, when you got to work at her in the spring did she not lie in a fair condition for raising as when you quit work on her?

A. The ice was much heavier in the spring than when the first tide was there.

Q. Aside from the ice, was not her condition just as good as in the fall?

A. All the difficulty was in the ice. The boat lay as
344 straight, as far as we could tell—and we had a good chance of judging—she lay about as straight in the spring as she did when she sunk.

Q. Was there not some advantage in having heavy ice to walk on in using beams and timber to lay across and fastening chains over thin ice, that would easily give way and would not bear pressure?

A. This thin ice—it would be in the way and would not be any benefit. If the ice was pretty heavy it would cost something to get it out of her.

Q. Of course it involved some expense to remove heavy ice from the inside of her hold and about her guard, so as to free her from the ice; but, aside from that, was not the ice an advantage in having it good and solid to work around on with your beams and appliances for raising her. Is not that a fact?

A. Of course the ice was a disadvantage any way you can fix it. Having so much ice in the boat makes it so much heavier; but, as far as working around her is concerned, it was an advantage to have heavy ice.

Q. You had never raised a boat by having piles driven around her?

A. No, sir.

Q. It was a plan you had formed in your own mind and which you thought would be successful?

A. Yes, sir.

Q. You did not have an opportunity of testing it?

A. No, sir.

Q. Was there anything in her condition when you left her in the evening that would make it at all probable that she would have sunk without this collision of the Butte, or something of that kind?

A. No, sir; she would not have sunk without a collision, or something of that kind; not in the condition she was in at the time.

Q. Is it not uncommon or unusual with boats in the Upper Missouri to have more or less broken timbers or planks that are
345 injured, and to require pumping as often as 5 or 6 times in every twenty-four hours?

A. No, sir; nothing unusual at all; something unusual if they do not get that way after making late trips.

Q. You did not go on board of her until after Weaver & Co.'s men had dropped her down to the foot of the ways?

A. No, sir; not until she was dropped down.

Q. Then might there not have been some timbers laid across the top of the deck and fastened in some way to strengthen her with a view to their making fast their straps without you knowing it?

A. Yes, sir; there might have been something of that kind, but I do not think there was.

Q. Barney Flynn, a witness who has been examined to-day, testified that he is one of Weaver's men and working on her when they were dropping her down, fixing timbers across the top of her in making fast.

A. Yes, sir; in making fast their straps.

Q. And he might have done so without your knowledge?

A. Yes, sir; but I do not think there was anything of that kind done, because I had run across them after she had sunk.

Q. Well, which was the longer boat, the Butte or the MacLeod?

A. The Butte.

Q. How much larger in proportion?

A. I suppose she was about twice as large; about twice as large in carrying capacity; very near it.

Q. When you left her in the evening who was on board of her that night she lay at the foot of the ways?

A. Mr. Bagley, I think, was there when I came up town,
346 and I think Mr. McClenden was on board of her.

Q. Had he been employed on her?

A. It seems to me sometimes as if he was, and then I do not exactly remember. I think he was employed temporarily at that time or immediately afterwards; I do not know which.

Q. You think he was on board of her?

A. Yes, sir; when I came uptown.

Q. When you went down to her did you find them both there?

A. Yes, sir.

Q. You did not think it any part of your duty to pass judgment as to whether she was properly shored or not?

A. No, sir; it was none of my business; no, sir.

Q. This man Deitz had been mate on the Butte, had he not?

A. Yes, sir.

Q. And he was in charge of part of the work or tackling in hauling her up?

A. Yes, sir; he had been assisting in the rigging.

Q. Is it not a fact that from seeing how active he was in the hauling out of the Butte that it prompted you to caution Mr. Bagley that he was not to do anything about her; that she was turned over to Weaver and Co.?

A. No; I did not think anything about Charley Bagley's working at the time, but I did not want them to throw the blame onto him for the boat.

Q. Do you know anything about the contracts made be-
347 tween her owners and Weaver and Co. with regard to hauling her out? Did you know about it then?

A. Only from hearsay.

Q. You had no knowledge of what arrangements had been made with reference to the hauling out of the MacLeod, except that you understood generally that Weaver and Co. was to take charge of her?

A. That is all. I did not know anything about it at all.

Q. Did Weaver & Co. ask you to make any contract with reference to her in any way?

A. No, sir; said they had seen Baker and supposed it was all right.

Witness fees, $1.50; paid.

348 JESSE MACCLENDEN, of lawful age, being duly produced, sworn, and examined on the part of the libellants, deposeth and saith:

Direct examination by J. H. DAVIDSON:

Q. State your full name, age, and place of residence.
A. My name is Jesse McClenden; my residence is Weston, Platt Co.
Q. What is your occupation?
A. I have been a steamboat man for the last 20 years.
Q. Where?
A. On the Missouri river.
Q. In what capacity?
A. I have acted in almost every capacity on a boat. My capacity generally has been pilot.
Q. How many years have you been a licensed pilot?
A. I believe it dates 20 years.
Q. What boats have you run on as pilot—about how many different boats?
A. A dozen or two. I could not tell you exactly. I cannot now tell the exact number.
Q. Had you ever any connection with the steamer Colonel McLeod?
A. Yes, sir; I steered her for a good many miles.
Q. Was you pilot on her in the year 1879?
A. Yes, sir; I went to Benton on her in 1879, and back.
Q. The last trip before she sunk?
A. Yes, sir; I was on her when she sunk.
Q. After she went to Benton and came back here did she make any other trip to some point?
349 A. She went down to the fort to put off some men that got crippled on her down trip—to Fort Lincoln; then came back here to the ways; was tied here to the bank.
Q. What condition was she in the last trip?
A. She got some of her timbers broke; I do not know how many or how much; I never examined the number of timbers broken on her; she was broken bad enough, anyway, so that we had to build a bulkhead in her, and then we made our trip without a great deal of difficulty; we took some water, but not much.
Q. Is that an unusual or a usual thing?
A. It is quite common for them to get timbers broke; nothing unusual at all.
Q. Do you know about how often the pumps had to be used on the last trip?
A. It was not a very big job to keep the water out of her.
Q. About what date was it that you laid her up?
A. It was some time in November, 1879.
Q. How far was it above the foot of the ways?
A. Well, sir, I could not say; once or twice the length of her, perhaps—once or twice the length of the boat; just enough to have her out of the way of the other boat that was being taken out.
Q. You stayed on board of her?
A. Yes, sir.

Q. Was on board of her when she sunk?

A. Yes, sir.

Q. Who dropped her down in front of the ways that day?

350 A. Mr. Weaver and their crew; he was boss who had charge of the thing; none of the steamboat crew had anything to do with it.

Q. About what time in the day did they drop her down there?

A. I should think in the evening about sundown, I guess.

Q. Where was the Butte at that time?

A. Out on the ways.

Q. About how far upon the ways from the water line?

A. She was 50 or 60 feet from the water.

Q. Was you out of her in the evening?

A. No, sir; I did not walk around her; I stayed on the MacLeod.

Q. Who stayed on the MacLeod on that evening, besides yourself?

A. Charley Bagley, the carpenter, the watchman.

Q. Was there anybody else on board that boat, that you know of, except yourself?

A. I do not know of anybody else on board.

Q. What kind of an evening was it as to being stormy?

A. I think it was a tolerable calm evening. I did not notice any wind; there might have been a little breeze blowing, but nothing strong enough to affect the boat I was on, or I would have noticed it.

Q. Nothing unusually strong?

A. No, sir.

Q. About what time did you go to bed?

A. I suppose it was between 6 and 7 o'clock. I was not very well that evening and laid down early.

Q. Which side of the boat was your room on?

A. On the starboard side.

351 Q. She lay with her bow upstream?

A. Starboard side lay next to the ways and my berth was on that side.

Q. Had you gone to sleep when this accident took place?

A. No, sir; I had not gone to sleep when it happened.

Q. State what took place, what you did, where you went, and what you saw.

A. When the crash came I jumped out of bed and looked around. There was window lights in the room and I looked out to see what was the matter. There lay the Butte alongside of us, and then I knew what was the matter. It was a terrible crash; it quite alarmed me. I looked out of the window and saw her lying alongside of us. I jerked on my clothes as quick as I could and went down to see what was the condition of the hull, and when I got down there there was considerable water in it. I heard the water pouring in her at different places alongside the hull, and I came to the conclusion that there was no show for our pumps to save her. When I saw that there was not much to be done for her I went upstairs and we had a rope thrown out on the Butte. I calculated that when she

sank she would turn over, perhaps, not knowing the condition of the bottom of the river there—generally deep water.

Q. Yes; well, what next did you do?

A. Well, we and Charley and others had a talk about proceedings, and we thought there was no use to go to work and pump; the water was gaining so fast the pumps could not do anything.

352 Q. Did you see before she sunk, when you first went down, anything about the magnitude of the breaks in her side?

A. The Butte was laying aside of us; I could not find out unless I went down in the hull, and I did not think it was necessary.

Q. From the sound of rushing waters and the quantity in her hull you knew the boat could not be saved?

A. Yes, sir; I knew the thing had gone up the spout.

Q. How much of an opening, in your judgment, was there in her side to allow such a rush of water?

A. I think it must have been considerable; I could not see; that is a matter I could not tell anything about, except that the water was coming very rapidly, and that is all.

Q. Was there any appearance of the side next the Butte being broken?

A. I did not notice anything about that; it was a matter that did not concern me; I wanted to see if there was any show to save the boat, and I saw that we could not do anything with it.

Q. How many minutes was it from the time that the Butte struck her until she was down on the ground?

A. It was not over 20 minutes; something in that neighborhood; 20 or 25 minutes, perhaps.

Q. When you went on the deck was the nosing of the Butte resting on top of the MacLeod or were the boats in collision or was there space between them?

353 A. There was no space between them; the Butte had crowded the MacLeod out from the bank; I did not see any signs of her leaning on the MacLeod.

Q. Had she crowded her out so that there was space enough to float the Butte?

A. She kind of hung on the end of the ways, but she was principally in the water.

Q. Who was on board of the Butte?

A. The mate was there; Charley Deitz was there, and perhaps one or two more men. I cannot say how many there were.

Q. What was done; any spars set or anything of that kind?

A. Not that night; there was no spars set that night. There was quite a number of men came down. We rang the bells on boats and thought we would see if we could do anything, but it was no use.

Q. What was the condition of things next morning?

A. Well, the boat was lying quite easily—laying tolerably straight. The stern was a little deeper than the bow. The nose was out of the water, and she remained so for a day or two.

Q. How much water was over her deck?

A. I suppose, maybe, 4 feet. I could not say.

Q. Was any measurements made of the water to find out the depths alongside the MacLeod?

A. I did not measure the water; no, sir.

Q. Did you see any measurements made?

A. I do not think I did.

Q. What was done the next morning with the Butte?

354 A. They tried to shove her down the river, and they did succeed in getting her down the river a little ways. She lay alongside the MacLeod.

Q. But she was somewhat free—off from her?

A. She was against her all the while.

Q. Where did you stay that night?

A. On the boat.

Q. How long?

A. I remained there—do not remember how long—until they gave her up—until they gave up all idea of saving her at all. I then came uptown. I was sleeping on board of her all night, and I felt there very comfortable and stayed there, although, as I thought, there was no prospect of saving her.

Q. Was she listed?

A. Not a great deal; she kept tolerably straight.

Q. Was there any appliances here in the shape of barges or any apparatus suitable for raising a sunken boat in that condition?

A. Nothing that I know of nearer than St. Paul or St. Louis. I did not know of anything nearer than that.

Q. Had you ever had any experience in raising these boats?

A. No, sir; I never had any experience in that way. I have sunk two boats in my time, but sunk them so much that they did not try to raise them.

Q. Did you see Captain Johnson or Deitz about the Butte about the time she was being hauled out?

A. Yes, sir; more or less all the time.

Q. Did you hear them giving any instructions about her management?

355 A. I do not know that I saw them parties giving any or hear them give any instructions about handling the boat.

Q. The master or some one representing each of the boats was about the yards more or less?

A. Captains Johnson and Murphy were both there.

Q. Do you know Captain Mason?

A. Yes, sir; he was there frequently; he was there stopping on the Bachelor.

Q. Mason was stopping on board of her?

A. Yes, sir; at the time I believe he was officiating as clerk. I do not exactly remember what he was doing on that boat.

Q. Did you go up the next day to look at the manner in which the shores had been set to hold the Butte in place?

A. I never made any examination of them.

Q. Just preceding the time of the shock, when she came into contact with the MacLeod, was there any unusual wind sufficient to attract your attention?

A. I did not notice anything at all. If there was any breeze blowing I did not observe it, and I am very likely to observe things of that kind.

Q. Mr. McClennan, from your knowledge of the weight and tonnage of such vessels, would it not require a wind amounting to almost a hurricane to shake her up when she was settled as she was?

A. I would say it would take a pretty good wind to move her.

Q. If there had been any wind there sufficient to move her you would have noticed it?

A. I think I would have observed it.

356 Q. It would have to be something more than an ordinary breeze, would it not?

A. Yes, sir; it would have taken something more than an ordinary breeze; I did not observe any wind sufficient to move a steamboat on the shore.

Q. Captain, in traveling on these boats as pilot, and from 20 years' service on the Upper Missouri river here, you are more or less familiar with the value of steamboats of that class, are you not?

A. Yes, sir; I have had some little experience as to the value of boats.

Q. In your judgment, what was a reasonable, fair value of the MacLeod in the condition she was in the night of the accident?

A. Well, taking everything into consideration, I would suppose that she was worth $10,000 at the time. I do not think I should have been willing to have taken less than that for her.

Q. After the accident who remained there in charge of the efforts to raise the MacLeod?

A. Captain Murphy was there officiating, and his watchman was there all the time; did not assist; only requested to stay there.

Q. Who seemed to be in charge of the Butte at this time?

A. Her master and mate were there as well as the watchman; the mate was there all the time; he stayed there all winter, I believe.

Q. Captain Johnson there for some time?

A. He was there; I do not know how long he remained; perhaps a few days; I do not know how long.

357 Q. About how much incline was there to these ways?

A. I should say it was steep enough to give a boat a good run. I know that she came down with force enough against the MacLeod. I thought the world was coming to an end.

Q. Had you known Mr. Weaver prior to this time, when he was working about the Butte?

A. I saw him a few times. I never had any particular acquaintance with him; was a stranger to him; I saw him a few times previous to that.

Q. Where was Mr. Bagley at the time of the collision?

A. He was down about the bulkheads. He went down there to see if he could make some arrangements to stop the leaks, so that he could get up and get some sleep. I went down and he was standing around when I went down there; he was trying to get out; he had got his lamp knocked out and he could not see his way out, and

I called to him and he says he wanted to know which way to come; I hollered to him and he answered me; said his light was out. He said he could not get out, and I said, "Come this way, Charley; this is the road," and he finally got out.

Q. Had the water got up far?

A. I do not know how deep the water was at the time; I could not see any and I could not see any timbers when I went down there; it was getting a little dusky; if I could have seen the water I could have seen the timbers, if they had been naked.

Q. During the preceding day and other days before that you was knocking around on the deck, more or less?

358 A. I was on the boat all the while.

Q. See much water?

A. She was not leaking much; very little.

Q. About how often did you think Bagley had to pump her out?

A. Not more than—I could not say. She did not leak much.

Q. What did he use?

A. One of those common hand pumps.

Q. Was she in such a condition that there was any danger of her sinking without this collision?

A. No, sir; she had run several hundred miles after she had this break. I think we got that break up on the river on the way to Benton. We went up there and came back again, and after that she made another trip up the river. We went to Fort Lincoln and came back here.

Q. About where in the river was it that she got that break that rendered it necessary to put in a bulkhead?

A. Somewhere in the neighborhood of 200 miles below.

Q. Then the bulkhead was put in and you went to Benton and also to Lincoln, you say?

A. We proceeded around up- our journey and came back.

Q. You went to Lincoln and then came back here?

A. Yes, sir.

Q. There was nothing in her condition that rendered it necessary for Weaver & Co. to use any particular haste in getting her out?

A. No, sir; nothing more than they wanted to get her out.

359 Q. It had got to that season of the year when ice begins to form?

A. Well, there might have been a little ice before that, and possibly some that day. It turned a little colder after that, but——

Q. How soon after this accident did it turn cold enough to make considerable ice in the river?

A. I suppose some week or ten days. In about a week or ten days it began to freeze pretty hard.

Q. Was there any way to get chains under her and draw her up before the arrival of the diver here?

A. Not unless they had driven down piles on the outside of her.

Q. Could piles be driven and made secure in such mud and sand as is usually found at the bottom of the Missouri river, in your best judgment?

A. Piles could have been driven outside of her the first five or six days after she sunk; had got a foundation to work on, and had the machinery there to do it, and they were driving piles with the railroad driver up there, and they could not get that until after they were done, and Captain Murphy was ordered to suspend operations until after the diver should arrive.

Mr. McCLENDEN, the day following the giving of the above testimony, was recalled on the part of the libellants, and testified as follows:

Direct examination by J. H. DAVIDSON:

Q. Mr. McClenden, you are the witness who has testified heretofore in this case, are you not?

A. Yes, sir.

360 Q. You stated that you wanted to make an explanation?

A. I got my trip to Benton and the trip to Lincoln mixed up. I have had so many trips on steamboats that I got the thing mixed up. I had forgotten it. It was on our last trip to Cow Island that we layed off. We went to Benton and returned here and went to Cow Island and returned to Bismarck and got a *l*angled before and only made one trip of it, and when I began to study the thing over I saw I was in error.

Witness fees, $1.50; paid.

361 JAMES WISE, of lawful age, being duly produced, sworn, and examined on the part of the libellants, deposes and saith:

Direct examination by J. H. DAVIDSON:

Q. What is your full name?

A. James M. Wise; from Richmond, Virginia.

Q. What is your age?

A. About 46.

Q. What is your occupation?

A. Pilot on the river.

Q. How long have you been piloting?

A. About 27 years.

Q. How many years have you been employed on the Upper Missouri?

A. That would be hard to tell. I have been employed here and on the Upper Missouri. I guess about 17 or 18 years on the Upper Missouri, as near as I can get to it; have been on her and all her tributaries.

Q. Was you employed as pilot on the steamer McLeod in the fall of 1879?

A. 1879? I cannot tell you.

Q. The last season that she ran?

A. Yes, sir; I was on the last trip she made to Benton. Yes, sir; was pilot; Captain Murphy was captain of her. Yes, sir; was pilot on her and Edwards was clerk.

Q. Very well; when and what accident happened to her in anything on her trip to Benton?

A. Nothing that hurt her at all.

Q. Nothing that made her unseaworthy?

A. Nothing at all.

362 Q. Nothing that made her unseaworthy?

A. Nothing that made her unseaworthy; no, sir.

Q. Did she run onto a snag or onto rocks?

A. We ran her onto a little rock a little below Carroll and broke some timbers in her.

Q. Was there a bulkhead fixed around a wound in her bottom at that time?

A. Not that I know of. I was pilot of the boat—this MacLeod.

Q. Yes; well, did she go on to Benton and complete her trip?

A. Yes, sir; we went on to Cow Island. Captain said he would like this boat to go on to Cow Island, and then we made a trip afterwards; when she got down there, I quit her then.

Q. Yes; did you come back on her when she went to Cow Island?

A. I went to Cow Island; I brought her down when she came down here, and Baker was here, and he told me I was sick, and they got a man—an old man—Jesse McClendon, and they went to Buford—Fort Buford—that is a place between Bismarck and Benton.

Q. Yes; well—very well—was you on board of her when she came back to Lincoln after her last trip to Cow Island?

A. What, when she brought those wounded men?

Q. Yes.

A. No, sir; I was not.

Q. What condition was she in as to seaworthiness when you left her?

A. In a good seaworthy condition; as seaworthy a boat

363 as ever I steered. There was nothing at all about her that would make her unseaworthy. She was in a good condition. Of course after a boat——

Q. Well, any vessel that runs up here in the fall is bound to be hurt one way or another?

A. Yes, sir.

Q. Are you familiar, by piloting boats and running in the Upper Missouri, with the value of boats of that class?

A. Well, I ought to be; I guess I can tell about as near as anybody can.

Q. In your judgment, what was the fair, reasonable value of the MacLeod when she landed here at the foot of the ways, after her last trip and before the accident in the year 1879?

Objected to as incompetent.

A. Between fourteen and sixteen thousand dollars; that was what she was worth; I could not replace the boat for that money now.

Witness fees, $1.50; paid.

364 D. W. MARRATTA, of lawful age, being duly produced, sworn, and examined on the part of the libellants, deposeth and says:

Direct examination by J. H. DAVIDSON:

Q. What is your full name?
A. D. W. Marratta.
Q. What is your ege?
A. I am 41.
Q. What is your occupation?
A. At present I am operating and managing a line of steamers here.
Q. What line?
A. The Coleson Line.
Q. How long have you been engaged in steamboating?
A. I have been engaged in steamboating since 1852.
Q. Do you own an interest or have you owned an interest in different steamboats?
A. I have, and do at present.
Q. About how many different steamboats have you built or bought or have owned interests in?
A. Well, sir, I could scarcely enumerate the number; I have been in the building business—my brothers, myself, and others—since about 1861.
Q. Are you familiar with the cost of building and the value of such steamers as are now used or have been in use on the Upper Missouri for the past 5 years?
A. Yes, sir; I think I am.
Q. Have you bought or built any steamers for that trade during that time?
A. Yes, sir; several.
365 Q. Was you here in the fall of 1879?
A. I was.
Q. Had you any connection with I. G. Baker & Co. or the Col. MacLeod at that time, or have you any connection with I. G. Baker at present?
A. We had none at that time and have not at present.
Q. Had you any connection with or interest at that time in the business of I. C. Power & Co. or the steamer Butte, or have you any now?
A. No, sir; we had not then and have not now.
Q. Were not the boats operated and controlled by both of those parties competing with the boats managed and controlled by yourself to a certain extent?
A. Yes, sir; to a certain extent they were.
Q. Did you know the steamer Col. MacLeod?
A. Yes, sir; I did.
Q. What was her character and what her thickness for an Upper Missouri river boat?
A. Well, sir; she was considered a very good steamboat for the purpose she was intended—that is, an Upper Missouri river steamer.

Q. Do you know what year she commenced business on the Upper Missouri?

A. I do not, sir; I do not recollect.

Q. One of her owners—Mr. Isaac G. Baker—has told us under oath that she was built expressly for the business of their firm in 1878, commencing to do business in the Upper Missouri during the season of navigation of 1878; ran until the close of the season,
366 and commenced business again in the spring of 1879 and ran through that season. It is shown by the evidence of her carpenters and others upon board of her that in the latter part of the season she met with some injuries on the rocks in the Upper Missouri, by which some holes were knocked in her bottom, and that some of her timbers were broken so that it would be necessary to put her in complete repair—to replace, in whole or in part, some 30 or 40 of her floor timbers, and to replace a portion of her bottom plank, depending upon how badly the bottom might be found to be injured after the vessel was hauled out. It is shown that she was landed at the foot of the temporary ways, upon which repairs were to be made during the winter of 1879, at or near Bismarck, and that later she was ready to be hauled out on the night she was sunk. Taking these statements as correct and supposing that her repairs would cost somewhere from one thousand to twelve hundred dollars to put her in good condition, what, in your judgment was her fair market value, lying here at the foot of the ways, on the evening of November 17th, 1879?

Objected to as incompetent and not in proper form and hypothetical.

A. Well, sir, of course, to answer the question as you gave, to suppose the boat to want the repairs—supposing the boat to want the repairs to the amount of twelve hundred dollars, I believe ——

Q. I suppose that the case.

A. And, judging from the stock we own ourselves, I would consider that boat worth, possibly, from thirteen to fourteen thou-
367 sand dollars. I never, of course, like to put a value on other people's property, but sometimes we have occasion to ascertain the price of boats and, of course, they vary like anything else.

Q. Aside from the hypothetical statement of facts which I have given you, from your knowledge of the boat and her capacity for Upper Missouri river business, and presuming that she was in good repair, what would you have supposed her value to be at that time?

A. Well, sir, I would have considered her worth $15,000 if she had been in good repair.

Q. Was it the usual condition of boats coming out of the Upper Missouri river trade at the close of the season as having more or less damaged hull?

A. Well, sir, that depends upon the persons what were handling the boat. Some of them would come out in good condition and some of them worn out.

Q. Was it usual or unusual for the Upper Missouri river boats to have holes knocked in their bottom, so that it is necessary to build temporary bulkheads in order to complete their trip—the season's business?

A. In my experience here for a number of years I have had that only happen once, as far as that was concerned, and that was last season.

Cross-examination by C. D. O'BRIEN:

Q. You regard the knocking of holes in her bottom to be a very serious damage to her, do you not?

A. Yes, sir.

368 Q. Supposing that the boat is damaged to the extent that 100 feet of her floor timbers would have to be removed, you would regard that as very serious damage, would you not?

A. Yes, sir.

Q. Suppose that the boat was damaged so that when she was lying at the levee she would have to be pumped out to keep her from sinking?

A. The owners would not want, possibly, anything of the kind.

Q. What, in your judgment, would have been the valuation of the MacLeod in 1879 if she was in such a condition that they had to pump her out here while she was lying at the levee?

A. Well, Mr. O'Brien, if, from the things that you speak of—first, of her bottom being broken—timber broken—it would make the boat, you know, in bad shape; I will explain if you wish.

Q. No; would you consider her valuation if she was in such a condition that she had to be pumped out as I have said?

A. Her value then, of course, would only be changed by what repairs it would take to put her in good condition.

Q. If the repairs would cost four or five thousand dollars that would depreciate her value to that amount?

A. Of course.

Q. Then your best judgment as to the estimated worth, $15,000, was when she was in good order?

A. Yes, sir.

Q. That is, in your best judgment?

A. Yes, sir.

369 Q. How late did you stay in Bismarck that fall?

A. Until very cold weather. I could not remember the date.

Q. As late as the occurrence of the accident?

A. No, sir.

Q. You left before this occurred?

A. Yes, sir.

Q. About how long?

A. I do know; possibly about 3 weeks.

Q. In October?

A. Yes, sir.

Q. You know nothing of the condition of the "McLeod" personally when she was lying here at the levee?

A. No, sir.

Witness fees, $1.50; paid for Marratta.
" " 1.50; " " C. S. Weaver.
" " 1.50; " " Barney Flynn.
" " 1.50; " " P. Murphy.
" " 1.50; " " Jesse McClenden.
" " 1.50; " " U. Wise.

Witness fees	$7 50
Reporter's expenses to Bismarck and ret.	14 50
" " ½ paid by libellants	20 25
Charge for taking and transcribing testimony, 455 fols., at 12 cents per fol.	50 00
	$77 75

(Endorsed:) Filed November 22nd, 1882. Wm. A. Spencer, clerk.

370 *Depositions Taken at Bismarck, D. T., in the Month of April, 1882.*

UNITED STATES CIRCUIT COURT,
District of Minnesota:

In the District Court of the United States. In Admiralty.

ISAAC G. BAKER *et al. vs.* THOMAS C. POWER *et al.*

J. H. Davidson appeared as proctor for the libellants, C. D. O'Brien appeared as proctor for the respondents, and J. K. Weatherby appeared as notary public.

Captain JOHNSON, of lawful age, being produced, sworn, and examined on the part of the respondents, deposeth and saith:

Direct examination by C. D. O'BRIEN:

Q. Captain, what is your name?
A. A. M. Johnson.
Q. What is your age?
A. 44.
Q. Residence?
A. Leavenworth, Kansas.
Q. What is your occupation?
A. Steamboat man.
Q, You are the master of the steamer Butte, are you not?
A. Yes, sir.
Q. How long have you been master of the Butte?
A. I was three years.
Q. The last three years?
A. Yes, sir.
Q. How long have you been engaged in the steamboating business?
371 A. Since 1865.
Q. How long on the Missouri?

A. All the time on the Missouri river.

Q. Have you served in any other capacity besides that of master?

A. Yes, sir; carpenter, pilot.

Q. How long have you been master?

A. Since 1879.

Q. Were you in command of the steamer Butte during the season of navigation of 1879?

A. Yes, sir.

Q. You were in command of the Butte during the season of navigation of 1879?

A. Yes, sir.

Q. Was she running in the Upper Missouri trade that year?

A. Yes, sir; from Bismarck to Benton.

Q. Where did you lay her up that fall?

A. At Bismarck.

Q. State the time and month.

A. The 12th of November.

Q. When you laid her up was she dismantled?

A. All dismantled and laid up for the winter.

Q. Did you pay off and discharge the crew?

A. They were all paid off and gone home, except the watchman to take charge of her—to take care of her property through the winter.

Q. Did you make a contract with Weaver and Co. for the hauling out of her on the ways that fall?

A. Yes, sir.

Q. The ways here were operated by Weaver and Co., were
372 they not?

A. Yes, sir; I made a contract with them known as Exhibit "B" in Weaver's testimony.

Q. After that contract was made what did you do with the boat?

A. My contract with them was to drop the Butte down to the foot of the ways and they would take charge of her.

Q. What date did you drop her down to the foot of the ways?

A. About the 14th, I think.

Q. About the 14th of November?

A. Yes; to the foot of the ways, where they could handle her without any extra expense.

Q. When you dropped her down to the foot of the ways what did you then do with her?

A. Turned her over to Mr. Weaver.

Q. Did you surrender her to his control completely?

A. Yes, sir; the full management was turned over to him. The full management of the boat was turned over to him.

Q. Did you retain any custody or authority or control over her at all?

A. None whatever; only what property was on her for the watchman to look after.

Q. As to the handling of her, the fastening of her on the ways, and the management of her on the ways, did you have any authority or control whatever?

A. None whatever; I never used any.

Q. Did you in any manner direct or suggest as to the manner of her being hauled out or kept on the ways?

373 A. None, to my knowledge.

Q. Who was the watchman?

A. Charley Deitz.

Q. He was the watchman?

A. Yes, sir; the man I hired to take care of her through the winter.

Q. He had been mate on her, had he not?

A. Yes, sir.

Q. Had you paid him off and discharged him as mate, and had his time commenced as watchman?

A. Yes, sir.

Q. His commission and authority as watchman had ceased?

A. Yes, sir.

Q. When the crew was paid off?

A. Yes, sir.

Q. And this was all done before she was hauled out on the ways?

A. Yes, sir.

Q. Before she was taken hold of by Weaver and Co.?

A. Yes, sir.

Q. What are the duties and functions of a watchman?

A. Simply to look after and watch the property of the boat; to keep it from being stolen; safe from fires; all he could do; if she was in the river, to keep her afloat.

Q. A great deal of furniture is generally left in these boats, is it not?

A. Everything is left on the boat.

Q. Everything is left on the boat?

A. Yes, sir.

Q. And the watchman is required to take charge of those things?

A. Yes, sir; he is held responsible for what is on her.

374 Q. And that is the limit and authority of his duty?

A. Yes, sir.

Q. Were you present and did you observe the operation of the hauling out of the Butte?

A. Yes, sir; I was there. They hauled her out as far as they could pull her; they pulled her out in about two hours. It was noon then, about the time they got her out, and all hands went to dinner, and I saw all I wanted to see and did not come down to her any more that evening. I was stopping at the Sheridan House. About 9 o'clock at night——

Q. The Sheridan House is about a mile and a half from the ways, is it not?

A. Yes, sir.

Q. About noon, when they got her hauled up, you saw all you wanted to see, and left?

A. Yes, sir.

Q. You did not go back until after the accident?

A. No, sir.

Q. When you left her do you know whether or not she had reached her berth on the ways?

A. They did not have the ways finished out full length to hold the boats; had men at work at that. They intended to finish the ways out and pull her further up.

Q. When you left there she had not reached her permanent winter berth?

A. They meant to pull her about 30 feet up further.

Q. When you left was the tackle taken off?

A. No, sir; everything was on her as they pulled her out of the river. He had commenced taking off some.

Q. Had she been stayed or propped at the time you left?

375 A. They had a shore at each end of her. Her rigging was all on her, and it was not necessary to shore her then.

Q. The shoring that you saw—was it temporary or permanent?

A. Only temporary.

Q. Do you know whether or not they put on any hutchicks at the time you left?

A. Not at the time I left. I had not been down there more than a couple of hours.

Q. Did Weaver & Co., or any of their men in charge of hauling her out, consult with you as to the hauling of her out?

A. They had already hauled out other boats and were pretty well posted. Captain Grant Marsh, when they were pulling out the first boat, suggested things to him. After he had got the Eclipse out he understood the things pretty well and managed the things himself.

Q. Was there any talk to you with reference to the matter of her being laid temporarily on the ways before they removed her to her berth?

A. None at all.

Q. The manner of hauling them out and their being placed upon the ways was run by Mr. Weaver alone?

A. Yes, sir.

Q. That was run by Mr. Weaver?

A. Yes, sir.

Q. You had no right of interference in the matter, one way or the other, as to the hauling her out and the placing of her on the ways?

376 A. I paid him so much money to pull her out during the winter and looked to him to do it.

Q. You had no right of interference in the matter one way or the other?

A. No, sir.

Q. After you had turned her over to him at the foot of the ways did your relation as master of the boat cease?

A. It had ceased when I was paid off with the balance of the crew.

Q. That was before you dropped her down on the foot of the ways?

A. Yes, sir.

Q. So that at the time this boat was hauled up onto the ways you were not her master?

A. No, sir.

Q. Did you represent the owners in any other capacity then?

A. None whatever at that time. After I signed the contract with Weaver and Co., on the 14th, my duties were done.

Q. Was there anybody else here representing the owners at that time?

A. There was Barr, the agent, here.

Q. He was the shore agent?

A. But I think he had left a day or two before the accident happened.

Q. Captain, when did you next see the Butte after you left her, at noon, you say?

A. The next morning after the accident.

Q. You saw her the next morning, after the accident?

377 A. Yes, sir.

Q. At about what time?

A. About 9 o'clock.

Q. What condition of things did you find when you went down there the next morning?

A. I found the MacLeod sunk and the Butte floating, laying alongside of her.

Q. Had the Butte been cleared from the MacLeod?

A. Yes, sir; all free. Weaver went to work and thought he could get her out again, but found that he could not do it and let her lay there. There was not room between where the MacLeod lay and the ways to get her out.

Q. Was any part of the Butte resting on the MacLeod or pressing down on her, or was she clear—floating—and laying as a boat would, one alongside of the other.

A. When she went into the river the Butte had no lines out, and the watchman was sent over and made a line fast and catched her to keep her from going down the river.

Q. Did you notice any breaks in the MacLeod?

A. No; I could not see any on her; her hull was under water.

Q. Did you notice any staving or breaks on the Butte?

A. Yes, sir; her railing was broke, her upper works, her nosing; her boilers was moved some; I do not know whether it was done by going over the logs or not—I do not know.

Q. No damage to her hull?

A. No, sir; no material damage.

378 Q. Well, did you do anything about the matter?

A. No, sir; I just told Mr. Weaver that I wanted the boat out; that she was at his risk and that he must get her out.

Q. What did he say to that?

A. He said he would do all he could. I told him that in case he did not get her out that he would have to bear the expense of keeping her afloat in the winter, and I left her in his charge and refused to take any control of her and pay any money on her.

Q. He kept trying to get her out during the winter, did he not?

A. Yes; I left soon after.
Q. When did you get away?
A. Second day after the accident.
Q. So far as you know, did that boat remain in charge of Weaver all winter?
A. Yes, sir.
Q. When did you come back in the spring?
A. I came back in March.
Q. Where was she then?
A. Still lying at the foot of the ways.
Q. In the custody of Weaver and Company?
A. Yes, sir.
Q. Did they afterwards haul her out on the ways?
A. They cut the ice, and as the river rose kept pulling her out—getting her up, as far up as they could, on the ways, and when the ice broke they shoved her out.
Q. And so they finally got her out?
A. Yes, sir.
Q. Did they afterwards launch her in the spring?
379 A. Yes, sir; they put her back in the river.
Q. So they finally carried out their contract with you?
A. Yes, sir; and I paid them.
Q. What, if anything, did Mr. Weaver say to you in relation to his taking care of that boat all winter?

Objected to as leading and being immaterial and hearsay.

Q. What I want to get at is this: You say he had charge of her all winter; you were not here during the winter; and what I want to know is what he said in relation to taking care of her.
A. He told me when I came back that she had cost him about eleven hundred dollars before they got her back into the river.
Q. What did that arise from?
A. Keeping her afloat here during the winter; trying to get her out; cutting the ice from under her in the spring; blocking her up, and putting her back in the river.
Q. Did you ever, from the time you turned that boat over to Weaver and Company at the foot of the ways, resume charge or control of her until after they had put her back into the river?
A. Only to repair what was broken.
Q. What is the custom here to repairing boats; are the repairs done by the owners?
A. Yes, sir; that has always been the custom here; all Weaver & Co. were to do was to pull the boats out for so much money, block them up, and put them back into the river again when they
380 were repaired by the owners, and the owners were to do their own repairing.
Q. The owners were to do their own repairing.
A. Yes, sir.
Q. They took no part in the hauling of them out and keeping them on the ways?

A. No, sir; they just paid them so much for hauling them out on the ways.

Q. Who was responsible for the care of the boat in hauling her out, propping her up, and keeping her on the ways?

A. They were responsible; they had her in charge—Weaver & Co.

Q. When did you resume your position as master?

A. I took charge of the boat after I paid Weaver and settled up—after she was in the river.

Q. Did Dietz go on with you the next season as mate?

A. He went out as mate.

Q. When did his commission commence again?

A. When we commenced; when they got her back into the river.

Q. When they got her back into the river in the spring?

A. Yes, sir.

Q. Did you see the Colonel MacLeod when she was dropped down at the foot of the ways?

A. I saw her when they were handling her above the ways—50 or 100 feet above the ways. I did not see her after she was dropped down at the foot of the ways; I did not go down that evening.

Q. You did not know anything about it until after the accident, that the MacLeod had been dropped down at the foot of the ways and moored there over night?

A. I did not.

Q. Did you know anything about Weaver and Company's intention to do that?

381 A. I knew that they were trying to get her down, but I did not think they would get her down that night; there was so much ice running.

Q. Did you know of their intention to moor her at the foot of the ways over night?

A. I knew that they were going to pull her down.

Q. You did not suppose that they were going to tie her up at the foot of the ways, did you?

A. No, sir.

Q. Could not the MacLeod have been moored out of danger, so that she could have as readily been put on the ways as a practical matter?

A. Just as well; yes, sir.

Q. Was there any reason or necessity of taking that boat down there and mooring her right in front of the ways and leaving her there over night?

A. The way it was there was really no necessity; if the river had frozen it would have saved them considerable expense by leaving her at the foot of the ways.

Q. It was a mere saving of convenience?

A. Yes, sir.

Q. In your opinion, was it good judgment, under the circumstances, the Butte not having reached her berth and being only temporarily stayed, to take the tackling off and leaving her in that condition on the ways, with the MacLeod laying at the foot of the ways?

A. I think it was carelessness and incompetency.

Q. If you had any authority or control of those ways or their operation would you have permitted a thing of that kind to be done?

382 A. No, sir; I would not.

Q. That is one of the main features in getting a boat on the ways, is it not, to properly secure her before you take the rigging off of her?

A. Yes, sir.

Q. How long had you known the MacLeod?

A. Ever since she came here. I do not know what year that was—about three years ago.

Q. She had been running in the same trade you had?

A. Yes, sir.

Q. To and from the same ports?

A. Yes, sir.

Q. And had you frequent opportunities of observing her and seeing her condition?

A. No; only seeing her in passing. She ran from Cow Island and Benton one season, and the next season she ran from here—the season she was with us.

Q. Did you notice what her condition was after they laid her up that fall?

A. Yes, sir; I saw carpenters at work all the time trying to keep leaks down. She was broke badly in her bottom where she had run over some rocks. Carpenters were at work on her nearly all the time—night and day.

Q. How was it about pumps?

A. I think they kept pumps going most of the time trying to keep the water down.

Q. Do you know whether or not they kept pumps going after she was dismantled and before they dropped her down at the ways?

A. Yes, sir; they had to keep the water from gaining on her.

383 Q. You are familiar with the value and worth of steamboats of that class, are you not?

A. Well, yes; I have some knowledge of it.

Q. What, in your judgment, was the value of the MacLeod in her condition as she lay at the foot of the ways before the accident?

A. Well, sir, if you mean just what she was worth then, I would not give thirty-five hundred dollars for her.

Q. Why, Captain?

A. She was all broke up and would have cost at least four or five thousand dollars to repair her, and she could not have been sold for over eight thousand dollars in good repair.

Q. If she had been in good repair she would not have been worth over eight thousand dollars?

A. No, sir; if that.

Q. What would you consider the value of her naked hull as she lay there dismantled, without machinery; what was the value of that hull alone?

A. Well, it was very nearly worthless the way it was.

Q. Well, could you put a value on the naked hull?
A. About twelve hundred dollars.
Q. She was a small boat, was she not?
A. Yes, sir.
Q. How much smaller than the Butte in tonnage?
A. She was a two-hundred-ton boat and the Butte a four-hundred-and-five. I judge that; I do not know that I ever seen her tonnage.
Q. Captain, in your judgment, could the MacLeod have been raised at that time—after she was sunk?
384 A. Yes, sir; the next two or three days or the next ten days.
Q. With the tackle and appliances which they had at the ways you think she could have been raised within the next eight or ten days?
A. Yes, sir.
Q. At about what expense to put her on the ways?
A. I suppose it would have cost them fifteen hundred dollars. I suppose about that. They could have got shores under and driven spiles along.
Q. And did Deitz while they were hauling her out interfere; have anything to say?
A. Nothing to say. I do not know as he was ever around.
Q. Some of those who have given testimony in this case claim that he was assisting.
A. If he did it was voluntary with him to assist Weaver. I never had any knowledge of his assistance.
Q. Would you have permitted it if you had known it?
A. If he done it to accommodate and help them along.
Q. You would not have let him exercise any authority?
A. No, because he had no authority. His place was to watch the boat and property on her.
Q. Captain, is there anything else in this matter that you would like to state?
A. I believe I have stated all I know about it in getting the boat off of the ways in the spring. Weaver hired Deitz to boss his men and paid him out of his own pocket. He acted as boss in getting her out the last time in the spring.
Q. Hired himself before he joined the vessel as mate?
A. Yes, sir.

385 Cross-examination:

Questions by J. H. DAVIDSON:

Q. You are one of the part owners of the Butte?
A. Yes, sir.
Q. And a defendant or respondent in this particular suit?
A. Yes, sir.
Q. You say that when you paid yourself off as master and discharged your crew, the 14th of November, that you ceased to have any authority or to exercise any control whatever about the Butte thereafter?

A. I was paid off with the balance of the crew somewhere along about the 14th. I do not remember the date.

Q. Was it the date you had delivered the boat to Weaver and Co.?

A. No, sir; it was before I turned her over to Weaver & Co. I do not know the date exactly. I turned her over to Weaver & Co. the same day as I signed the contract. I had a contract to turn her over the same day.

Q. The testimony of other witnesses shows that the accident occurred on the evening of the 17th of November. The contract put in evidence and signed and marked Exhibit "B," by the deposition of Weaver, shows—to be dated the same day—the 17th of November; that is probably the correct date?

A. Yes, sir; because the accident happened on the same day on which the contract was signed. I knew he was going to pull the boat out that morning, and I made him sign a contract before he took hold of her. Exact dates I do not recollect.

386 Q. When they put the straps on her and commenced to pull her out onto the ways was not you and Deitz both on board of her?

A. On the bank or on the boat—yes, sir. I do not know that Deitz was standing on the bank.

Q. Did you stay there and watch him most of the evening when they pulled on her the previous evening? Mr. Weaver has testified that he commenced to pull on her in the evening and pulled her up until, he thinks, she was about out of the water; then he rested her until the next morning and then hauled her up to the point where she stopped.

A. That is correct.

Q. Was you there in the evening when they made the first pull on her?

A. All the time they were bringing her out; I was there at both pulls.

Q. You witnessed both pulls?

A. Yes, sir; I was on the shore observing the tackling and the manner in which she was made fast. Every one is interested to see his own property taken care of.

Q. What experience had Mr. Weaver had in pulling out and handling vessels on ways?

A. Well, he had pulled out the Eclipse and the Bachelor before he had taken hold of the Butte.

Q. He had done this within a few days?

A. Yes; that is all the experience that I knew of him having.

Q. Then you knew he was not an experienced man in handling boats prior to his taking hold of this enterprise?

387 A. I did not know it until after I saw him handling the Eclipse, Captain Marsh was around there (an old steamboat man), and made suggestions to him about the work, and after that he seemed to get along all right. He pulled both boats out.

Q. Then you was present and saw his manner of handling the Eclipse and the Bachelor, and what conclusion did you arrive at as to his ability and competency for doing work of that kind?

A. I considered him all right after he got the hang of it, because he pulled the other boats out without any trouble. He made it known himself before he took hold of the boats that he did not know anything about that business, and said that any suggestions anybody had to make he would cheerfully accept of it and would not be offended.

Q. He talked that way about the time before these contracts were signed?

A. When he commenced on the first boat.

Q. That was before he signed the contract with you?

A. Yes, sir; before he signed mine; I do not know about the others.

Q. After the Butte had slid down onto the MacLeod you remained how many days?

A. I left next morning; on the morning following.

Q. Did you give any permission for the use of her boilers to get up steam, to set any spars, or to run any siphons about raising the MacLeod?

A. After I got down to Leavenworth, towards spring, they telegraphed me and wanted to use the boat's steam, asking per-
388 mission to raise steam on her, and I gave it to them. I do not know whether that was Mr. Baker or who asked the information; Captain Murphy, I guess; I do not now recollect.

Q. You and your crew dropped the Butte down to the foot of the ways?

A. Dropped her just so she would lap on the ways where you could get hold of her easily. I first landed her below the ways and Mr. Weaver made me take her above.

Q. You speak of ice running. Was there considerable ice forming then along the shore in the river; was there much ice running in the river?

A. It was freezing some.

Q. Well, it had reached such a season in the year when steamboat men might reasonably expect a cold wind or a cold night or two would make ice so that it would be very troublesome?

A. Yes, sir; it had got so that it would be likely to block up most any time.

Q. When did you come back to Bismarck first, after you left immediately following the accident—not until spring?

A. About somewhere in March; the middle or latter part.

Q. You say you did not know — Deitz giving any directions or assisting about handling the lines or tackling in getting out the Butte. Was you there pretty much all the time while she was being drawn up?

A. I think I was there most of the time.

Q. Did not Mr. Deitz boss one set of the lines because he was familiar with handling lines?

A. If he did it he done it at Mr. Weaver's request.

389 Q. Did he do it?

A. Not to my knowledge; I did not see him at work there; I do not know that he did.

Q. Now, was you down there night and day most of the time or only during the day?

A. During the day; I stayed up at the hotel; took my meals there.

Q. You speak of seeing the MacLeod frequently after she landed above the ways; how often was you on board of her?

A. Only once, I think.

Q. You was on board of her only once?

A. Yes, I think; that is, when she lay above the ways 100 yards or so. When she was dropped down to the foot of the ways I was on board of her and saw the carpenter at work, and he said it was all they could do to keep her afloat; I did not pay much attention to her.

Q. How often was you on board of her from the time when she landed, the 14th of November, to the 17th, the day she was wrecked?

A. I may possibly have been on her twice—not oftener.

Q. Not oftener than twice?

A. About twice, I think.

Q. How long did you stay on her?

A. Simply a few minutes.

Q. Did you go down into the hold? Did you go down under the deck?

A. No, sir; I did not go down; I saw the carpenter at work down there, and I asked him what he was doing, and he said he was stopping leaks.

390 Q. Then, of your knowledge, then you say that she was in a sinking condition and was not worth anything, you are only testifying from the facts you ascertained on two visits, and when you only stayed on her a few minutes at a time?

A. I could see from the general appearance of the boat.

Q. And was that all the information you had—your personal observation by these two visits?

A. That is all.

Q. You say that she was 3 or 4 years old?

A. I do not recollect how old she was. I do not know when she came out. I judged about three or four years.

Q. You are as positive about her age as you are about her condition?

A. She had been in the river three or four seasons. From the looks of the boat her condition was bad, as bad as it could be. I could look down the hold and see that she was full of water and broke in different places.

Q. What time of day was it when you visited her the first?

A. I think it was 10 or 11 o'clock.

Q. How long did you stay on board of her at that time?

A. Probably an hour; probably somewhere along there.

Q. How much water was in her hold at that time?

A. It was ice and water together. She was making about five inches of water in places in her, I should think.

Q. What day was that?

A. I do not know whether it was the 13th or 14th or 15th;
391 somewhere along there.

Q. The ice and water was over deck so that you could not see her timbers?

A. Forward—at the bow of the boat.

Q. Then, you speak about seeing broken timbers in her broken bottom; how could you see that if the water was over her timbers?

A. That is forward of the boilers where she was the heaviest, but aft where she was open-hold she was comparatively dry.

Q. How deep was the water in the open hold?

A. In some places there was not any at all; it will be drawn to where the boat is the heaviest; water will go to the heaviest place.

Q. When did you visit her next?

A. The next day, I think.

Q. How much water was in her then?

A. I do not know that I paid any attention to her particularly.

Q. Did you make any further examination of her broken timbers or bottom?

A. No, sir; it was none of my business; I did not make any.

Q. Suppose you was advised by the testimony of Silas Adkins, steamboat inspector (whom I presume you know), that that boat was built and came out here in 1878, in July, and that she ran through that season and ran in 1879 and was marked upon his register on the 10th day of April, 1879, as being valued at $13,000. Would that make any difference, in your opinion, as to the value of the boat at that time?

392 A. No, sir; not a dollar's worth. I would not give 50 cents more than the price I set on her.

Q. Would the fact that she was only a season or two seasons old make any difference in your valuation as basing it upon your opinion that she was 3 or 4 years old?

A. None whatever in the condition she was in here.

Q. Upon what do you base your judgment that it would take four or five thousand dollars to have repaired her—to have put her in good condition?

A. I think that she would have had to had new floor timbers all the way and new bottom, a great many new floor timbers—probably half of them.

Q. If the testimony of men who carefully examined the timbers goes to show that there was only 30 or 40 of her timbers broken at all or affected and perhaps a hundred feet of her bottom that had been scarred or injured and would have to be replaced, would you still set the cost of her repairs at three or four thousand dollars, taking it for granted that they were not mistaken as to the amount of damages to her hull?

A. They could not tell anything about her damage. I am judging the boat from what it takes to get boats repaired, and I know—— (Interrupted.)

Q. Well, Captain, experienced men, then, examining her carefully and counting the broken timbers and looking at the plank

from the inside, as far as there was any evidence of injury,
393 could not give any particular estimate or give any light as to what the probable cost of replacing her would be?

A. You cannot make an estimate of her until you see her bottom plank, and that you cannot tell from the inside.

Q. Then when you give your estimate you admit that you are simply guessing at it, because you could not see her bottom plank; you admit that you were simply guessing?

A. My judgment goes. I have been repairing boats for 20 years, and if I cannot tell within a couple of thousand dollars what it takes to get a boat repaired, then nobody else can until after you get her out.

Q. Then your estimate of four thousand dollars for her repairs may have been two thousand under or two thousand over. You could not tell until after she was out?

A. No, sir; I could not tell exactly. The way things cost here I do not think you could get the boat repaired for less than that.

Q. How many steamboats have you ever bought or sold?

A. Never bought or sold any. I have built one.

Q. You think that she could have been raised in the 10 days succeeding the accident. What appliances were there here; were there any barges?

A. There was no barges here.

Q. No diving suit or diver?

A. No, sir.

Q. Was there a marine pump?

A. There was no marine pump; would not require a marine pump at that time.

394 Q. Any tackle or apparatus here suitable for raising a sunken boat?

A. Well, they could have rigged up pumps and have got chains under her, and got her up with jack screws.

Q. How could chains have been gotten under her without any diver here or other apparatus to assist in placing chains under her?

A. They could have put chains right under her nose forward and hauled her back; they could have done that without a diver.

Q. How would chains under her have benefited in raising her?

A. Driving spiles on each side; put beams across and raised her with jack screws.

Q. Was there an outfit of jack screws here sufficient to raise a boat of the tonnage of the MacLeod?

A. Yes; there was plenty of jack screws here.

Q. Was there plenty of large enough and strong enough chains?

A. I do not know about that; I do not know whether there was or not; there might have been.

Q. Did you interest yourself to find out whether there were appliances accessible to be used in raising the MacLeod?

A. No, sir; I did not; I did not care anything about her, and it was none of my business.

Q. And at that time you had no thought that it was a matter in which you would be called upon to assume any responsibility as part owner of the boat?

A. If she was a boat of mine I would have raised her in
395 10 days; I would have raised her in 10 days without any trouble.

Q. In order to form a correct value of the hull, of machinery, are not these several parts going to make up one steamboat to be taken in connection each with the other?

A. Yes, sir; to a certain extent.

Q. The machinery of the MacLeod would not be of much account for a much larger vessel, or to put upon the market without a hull shaped to fit it?

A. I do not suppose it would be of much value.

Q. The hull of the MacLeod by itself, without machinery suitable or fit, it would not be very valuable.

A. No; only for a barge.

Q. The contract, Exhibit "B," provides that when the boat is ready to be put into the river in the spring three days' notice shall be given to the party on board; to whom did that refer?

A. I do not know.

Q. Was there any understanding outside of that reference that the owners of the boat should leave some one in charge of the boat through the winter?

A. I suppose that meant in case other boats was in behind us that they would give us three days' notice to get them out of the way, so that they could land the other boats; that is what that meant.

Q. Was there any understanding that some one should be on the boat representing the owner all the time?

A. Not to my knowledge; nothing ever said about it that I know of.

Q. Who was to be watchman on her for the winter?

A. Deitz.

396 Q. Was it not the construction, then, that notice should be given to him?

A. The construction meant that when the boat was repaired notice should be given to whoever was then in charge of her; giving him notice that he wanted the boat put out of his way.

Q. You did take charge of her and repair her, did you not, when you returned in the spring?

A. When I came here in the spring and after she was out I put men to work. Some time Weaver was to work with his gang getting ice from under her, and I do not think that his men ever quit work on her up to the time that my men commenced operations.

Q. You was bossing your own men in making the repairs?

A. I was paying them and bossing them; had taken a carpenter under my instructions. I paid my men and Weaver paid his.

Q. From your operation of the manner in which the Butte was hauled out on the ways and the situation of the ground and the boats when you looked at them the next morning, what was your

judgment about the manner in which she had been taken care of and stayed upon the ways?

A. It looked like a piece of carelessness to me, taking the rigging off a boat and leaving her with just shores set in the ground and, probably, a few hutchicks nailed on. They said that they had nailed them on, but I did not see any signs where they had been nailed on. I could see where the shores all had been turned back.

Q. They slipped at the bottom?

A. The boat, I think, had ridden right over them, the ground giving way.

397 Q. Was there any unusual wind that evening?

A. Well, I was not out. I do not know. They said the wind blew pretty hard down there.

Q. Nothing which you noticed especially?

A. Up to the hotel I could not hear it.

Q. When did word come to you the night of the accident that it had happened?

A. About 10 or 11 o'clock.

Q. You did not go down?

A. No; they said the Butte was all right, and it was very cold, and did not go down.

Q. Who came up and notified you?

A. A man; I did not know his name; I did not know who it was; some one who had been down there.

Redirect examination by C. D. O'BRIEN:

Q. There were no other ways here excepting those?

A. No other ways.

Q. It was necessary to have hauled your boat out that fall?

A. Yes, sir.

Q. You could not take her down the river?

A. No, sir; it was too late.

Q. Weaver & Co. ran those ways?

A. Yes, sir.

Q. You had to make this contract with him to get her onto the ways?

A. Yes.

Q. The tackling that was used on there was all the property of Weaver & Co.?

A. Yes, sir.

Q. You had no appliances to haul your boat onto the ways?

A. No, sir.

398 Recross-examination by J. H. DAVIDSON:

Q. Did they not borrow tackling out of it—lines and chains of various boats—to assist in piecing out their rigging?

A. They may have borrowed some to replace some old lines that broke; that I do not know about. It is always the case when you are handling boats that you will expect other boats to accommodate you when you get into a tight place.

Q. An experienced man, by putting strong hutchicks under her and spiking them onto the ways and proper shores, could have fastened that boat so that there would not be any possibility of her sliding back, could he not?

A. Of course; if she had been properly taken care of she would not have gone in. That is the way I look at it.

Witness fees, $1.50; paid.

399 ROBERT L. HAZEN, of lawful age, being produced, sworn, and examined on the part of the respondents, deposeth and saith:

Direct examination by C. D. O'BRIEN:

Q. What is your age?

A. 46.

Q. Where do you live?

A. At present in Yankton.

Q. What is your business?

A. Ship carpenter.

Q. How long have you exercised your business on the Missouri river?

A. About 12 or 15 years.

Q. Were you at Bismarck in 1879?

A. I was.

Q. Are you the Robert Hazen who was acting as foreman for Weaver & Co., in charge of the ways that fall?

A. Yes, sir.

Q. Did you as such foreman superintend the hauling out of the boats that were hauled out that fall by them?

A. Yes, sir.

Q. Do you remember the hauling out of the Butte?

A. Yes, sir.

Q. Do you remember the date she was hauled out?

A. I cannot state the date. I cannot tell you without referring to the books.

Q. In November, 1879?

A. I believe it was.

400 Q. Who did haul the Butte out?

A. Mr. Weaver.

Q. Weaver & Company?

A. As I understand them.

Q. Who had charge of the hauling of her out?

A. As foreman, I had to a certain extent, with Weaver's supervision over me.

Q. You were the foreman of Weaver and Company?

A. Yes, sir.

Q. Was she hauled clear out the first day?

A. The Butte?

Q. Yes.

A. I think she was.

Q. Do you know whether or not she had reached her berth on the

ways when the MacLeod was dropped down to the foot of the ways?
A. Yes, sir.
Q. She had reached her berth?
A. Yes, sir; she had been there some six or seven hours.
Q. Who dropped the MacLeod down to the foot of the ways?
A. I did.
Q. For Weaver & Company?
A. Yes, sir.
Q. By his orders?
A. Yes, sir.
Q. And with his assistance, of course?
A. Yes, sir.
Q. The MacLeod was allowed to lay at the foot of the ways over night?
A. Yes, sir.
Q. What was that done for?
401 A. I began to drop her down somewheres about 11 o'clock in the day. We wanted to get her down; to get her out that day, but there was such a gale blowing at the time that we could not do so; we wanted to get her down there to get her in right position.
Q. That was the reason she was not hauled out that day?
A. Yes, sir.
Q. Do you know Captain Johnson and Charley Deitz, the master and the mate of the Butte?
A. Yes, sir.
Q. Did either of those men have any control or authority or anything to say with regard to the hauling out of the Butte or the MacLeod?
A. No, sir; not as I understand it.
Q. Did they, as a matter of fact, exercise any control or authority or interfere in any way whatever?
A. No, sir.
Q. Anything to do with selecting the place where the Butte was to lay on the ways, or did they select any such place?
A. Not that I know of.
Q. All that was done was done under you?
A. Yes, sir; under me and Weaver's supervision.
Q. Who was it that shored up and stayed the Butte?
A. I ordered the men to do it. It was done under my supervision.
Q. Did anybody else but you have charge or control of that?
A. None but myself and Weaver.
Q. Whatever shores and stays were put under her were put under her by you, with Weaver's supervision?
402 A. Yes, sir.
Q. Johnson had nothing to say to that?
A. No.
Q. The boat was wholly in charge of Weaver and Co.?
A. Yes.

Q. That was also true of the MacLeod. She was entirely in their charge when they dropped her down, was she not?

A. That is the way I understood it. Being their foreman, I had to go there and get her ready.

Q. When did the accident happen?

A. It must have been about half past seven o'clock—between 7 and 8; some time in the evening.

Q. Was you down there at the time?

A. No, sir; I was uptown when it happened.

Q. How soon did you hear of it?

A. I suppose in 20 or 30 minutes after it happened.

Q. You went right down there?

A. Yes, sir.

Q. What condition of things did you find there?

A. I found the MacLeod lay sunk at the bottom of the ways and the Butte lying below her. They had dropped the Butte down.

Q. They had dropped her down?

A. Yes, sir.

Q. Was she floating?

A. Oh, yes.

Q. She was not resting on top of the MacLeod at all?

A. Not at that time.

Q. She was swinging to her lines in the stream?

A. Yes, sir.

403 Q. What, if anything, was done that night towards raising the MacLeod?

A. Nothing at all.

Q. The next day was there anything done?

A. I think not. I do not think there was anything done for several days towards raising her.

Q. In your opinion, could that boat have been raised?

A. Yes, sir.

Q. With the appliances there at the ways and with the men Weaver and Company had employed there, in your judgment, could that boat have been raised?

A. I believe they could have hauled her out. They did not have the appliances there, but I believe she could have been hauled out with proper handling.

Q. At about what expense?

A. That would be hard to judge of, for the simple reason that it would have been a kind of a new undertaking in the business to haul out a sunken boat at the ways, but still I believe it could have been done and the amount not exceeded 2 or 3 thousand dollars.

Q. Had you seen the MacLeod before that time?

A. Yes, sir.

Q. Knew what her condition was?

A. I knew she was in pretty bad condition.

Q. Was her condition one of the reasons why it was desirable to get her out as soon as possible?

A. I suppose that was one of the reasons, for they had to keep men all the time in her pumping to keep her afloat.

Q. You are familiar with Upper Missouri river steam-
404 boats, are you not?

A. Yes, sir.

Q. What, in your judgment, was her value as she lay at the foot of the ways before she sunk?

A. Between six and eight thousand dollars at that time, I guess.

Q. What would you consider the value of her hull without engine or cabin—the naked hull?

A. Between three and four thousand dollars.

Q. Did you remain with Weaver and Co. all winter?

A. Not all winter; very nearly all.

Q. During that time you remained here, that winter, did Weaver and Co. take the entire charge of the steamboat Butte?

A. Yes, sir; as near as I recollect, he considered himself in charge of her, and we attempted to get her out of the ice several times afterwards.

Q. Did you go to work for Weaver and Company again in the spring?

A. No, sir.

Q. About how late did you stay with Weaver and Co.?

A. Until some time in December, when we got through hauling all the boats out.

Q. During all that time Weaver & Co. took charge of the Butte?

A. Yes, sir.

Q. As far as you know she remained in their charge the entire winter; she remained in their charge, as far as you know, during the entire winter?

A. Yes, sir.

405 Cross-examination by J. H. DAVIDSON:

Q. Did you ever buy or sell a steamboat?

A. No, sir.

Q. Had you ever owned any interest in steamboats?

A. No, sir.

Q. How did you prop the Butte upon the ways at the point where she was left the night of the accident?

A. They had put the braces against her. Three of them were strips of timber, either 10 x 12 or 12 x 12, hard sticks of timber, and then there was five or four smaller braces about six inches square, I should judge.

Q. How were they fixed at the bottom?

A. They were dug down to the ground, which we call a shoul (showl), a piece of timber put down into the ground.

Q. Was there any hutchicks nailed onto the ways?

A. No, sir.

Q. What condition were those braces or shores in next morning? Did you examine them to see how the accident had happened?

A. The condition they were in was that they were all down and the boat had traveled over them.

Q. Had she turned them or driven them into the mud?

A. I do not know. I know she had forced them back.

Q. Well, were the ways well greased?
A. Yes.
Q. Was it freezing at that time?
A. Yes.
Q. Had you been in the MacLeod to examine her condition as to injuries in her?
406 A. I might have been down to look at it; yes, sir.
Q. Do you know of your own knowledge how often and how long she had to be pumped each day to keep her free of water?
A. To a certain extent, I do. The man employed on her at the time to do this business was an old acquaintance of mine and he was down in the hold most of the time. He was in the hold at the time this accident occurred bailing water.

Endorsed: Filed November 23rd, 1882. Wm. A. Spencer, clerk.

407 EXHIBIT "B."

This agreement, made and entered into this 17th day of November, 1879, between C. S. Weaver and Company, party of the first part, and the steamer Butte and owners, party of the second part, witnesseth:

The party of the first part, for and in consideration of the sums of money to be paid and the covenants and agreements to be performed by the party of the second part, agree to furnish the use of and room on the Bismarck marine ways at Bismarck, D. T., for the steamboat Butte during the winter of 1879 and until the river is free from ice in the spring of 1880, for which the second party agrees to pay $200, two hundred dollars, as soon as said boat shall be hauled out of the river and placed on said ways.

The parties of the first part further agree to haul the steamboat Butte out of the Missouri river onto said ways, said boat having first been placed in proper position in front of said ways by the second party, for the sum of one hundred and twenty-five dollars ($125), to be paid as soon as said boat is on the ways.

The parties of the first part agree to block up the steamer Butte to a convenient height to admit of caulking after she is on the ways for the sum of one hundred and fifty dollars ($150), to be paid as soon as said boat is so blocked up.

The party of the first part agrees to let the steamboat Butte down onto said ways for the sum of seventy-five dollars ($75), to
408 be paid as soon as said boat is so let down.

The party of the first part further agree to put the steamer Butte into the Missouri river in the spring of 1880, when said river is free from ice, for the sum of fifty dollars ($50), said amount to be paid when said boat is in the river.

And it is mutually agreed and understood between the parties hereto that the parties of the first part shall not be liable while handling the boat, as above stated, for any damage whatever to same unless said damage is caused by gross carelessness on their part.

And it is further mutually agreed and understood that the parties of the first part do not assume any risk and are not liable for damage to or the destruction of said boat from any cause whatever, except as heretofore stated, while said boat remains on said ways.

And it — further mutually agreed and understood that said boat shall not remain on said ways to the damage of any boat or boats that may be above her after the opening of the river in the spring of 1880, but that the party of the first part may then place said boat in the river, first giving three days' notice to the party in charge on board.

And it is further mutually agreed that as soon — said boat is afloat in the spring of 1880 all agreements to be performed by the first party shall be completed, and they shall be entitled to payment in full, in accordance with the terms of this agreement.

In witness whereof we have hereunto set our hands and seals this 17th day of November, A. D. 1879.

C. S. WEAVER & CO. [SEAL.]
A. M. JOHNSON. "

(Endorsed:) Filed Nov. 23, 1822. Wm. A. Spencer, clerk.

409 United States District Court, District of Minnesota. In Admiralty.

ISAAC G. BAKER *et al. vs.* THOS. C. POWER *et al.*

Williams and Davidson, proctors for libellants; O'Brien & Wilson, proctors for respondents.

Nov. 29, 1882.

NELSON, *J.:*

The plaintiffs, owners of the steamer Col. McLeod, bring suit in admiralty, *in personam*, to recover damages to the amount of $17,000 for a collision by the steamer Butte with their vessel. The gist of this action is the alleged negligence of the defendants.

The collision occurred upon the Missouri river, near the city of Bismarck, in the Territory of Dakota.

The steamer Butte was partly hauled up on the marine ways for repair, being dismantled and having on board as watchman the mate of the steamer during the previous season of navigation.

The owners had entered into a written contract with the persons in charge of the marine ways for hauling the vessel out, the terms of which contract are not material.

The steamer MacLeod had been put in charge of the same
410 persons who hauled out the Butte for the purpose of hauling her out, and had been dropped down to the landing in front of the ways and lay just at the foot of the same dismantled.

These ways are built and used for the purpose of repairing the hull of vessels, and are located on the land, the timbers gradually inclining or sloping to the river bank and run partly into the river or to the edge, so that vessels can be hauled out and up onto them broadside.

Marine ways are necessary for the proper repairing of vessels, and must be located near the water's edge, so that vessels afloat can be readily hauled upon them, and these dock-yards are not necessarily a nuisance, although the act of hauling out a vessel broadside upon them requires the exercise of great care and caution.

On the 17th of November, 1879, when the steamer Butte was partly hauled upon the ways, as stated, and the steamer MacLeod was in front, preparatory to being hauled out, the shores or props sustaining the Butte being insufficient to hold her in position, she slid down into the river and collided with the MacLeod, inflicting such injury that the latter was wrecked and sunk.

The collision, although not the usual one occurring between vessels while navigating the river, is governed by the same principles of law.

I am of the opinion that the owners of the Butte steamer are responsible for the injury inflicted upon the MacLeod if no blame can be attached to the latter vessel.

411 It is insisted that the contractors and not the owners are liable.

The fact that a contract was made between the master and part owner of the Butte with the persons who had charge of the dock-yard and ways, and who took the vessel to haul her up and perform his contract will not relieve the owners of all responsibility for loss occasioned by the negligence of such contractors.

The negligence of the contractors who hauled out the Butte is conceded, and at the time of the collision a watchman was on board of the vessel, appointed and designated by the master; in fact, the master was present when she was hauled and knew her position and how she was propped and stayed.

These facts fix the liability of the owners, for the persons employed to haul out the vessel are not such independent contractors, although the contract is in writing, that they can shield themselves from the consequence of the contractor's negligence.

This rule was applied by Dr. Lushington to the "Ruby Queen," where the facts and circumstances did not present a case as strong as the one at bar.

The "Ruby Queen" had been placed in the hands of a contractor for sale, and while under his sole charge drifted and collided with another vessel. She was held liable for the injury inflicted through the negligence of the contractor's servants. (Lushington Ad., 266.)

The rule in cases of towage is to be distinguished from this.

412 In the former, when the tow collides with a vessel through the negligence of the tug and inflicts injury, the owners of the tug, and not the tow, are held responsible as contractors. The reason is obvious, for the movements of the tug are not under the control of those in charge of the tow, and it is impossible for them to prevent the negligent act of the tug or take steps to intercept it.

In the case at bar the master and part owner of the steamer Butte was present when she was hauled out and knew her position and the manner in which she was propped and stayed. The plaintiffs,

therefore, are entitled to a decree, unless the MacLeod was also to blame and contributed to her injury.

It appears that the steamer MacLeod had laid up after her last trip near the marine ways and the master in charge had consented that the vessel should be removed from her position above to a point directly in front of them for the purpose of having her hauled out.

There is some evidence tending to show that the owners desired a contract with the operators and managers of these docks similar to the one entered into with the master of the Butte; but, as the master of the MacLeod consented to the change of place, it is not material whether such contract was actually made.

The master was responsible for the position taken by the vessel, and his consent is sufficient to bind the owners. He was not only present when she was dropped down, but assented, and left Bagley, the watchman, in charge, and also McClenden, the former
413 pilot, and both knew the situation of the steamer Butte.

It is quite clear that a proper course was not taken by the MacLeod. She ought not to have been placed in the position she occupied until the Butte was laid upon the ways in place and securely fastened. The master or person in charge, for whose act the owners are responsible, was to blame in allowing her to be dropped down at the foot of the ways in front of the Butte. It was a negligent act and contributed to the injury.

A decree will be entered in favor of the defendants for costs.

(Endorsed:) Filed Nov. 29th, 1882. Wm. A. Spencer, clerk.

United States District Court, District of Minnesota. Term Minutes, October Term, A. D. 1882.

TUESDAY MORNING, *November* 21*st*, 1882.

Court opened pursuant to adjournment.
Present: Hon. R. R. Nelson, judge.

(Title of case.)

This cause came on this day to be heard pursuant to stipulation, and on motion of Mr. Williams, proctor for libellants, the hearing is continued to November 22nd, 1882, at 10 o'clock a. m.

414 United States District Court, District of Minnesota. Term Minutes, October Term, A. D. 1882.

WEDNESDAY MORNING, *November* 22*nd*, 1882.

Court opened pursuant to adjournment.
Present: Hon. R. R. Nelson, judge.

(Title of case.)

This cause coming on this day to be heard pursuant to the order of continuance, on motion of Williams & Davidson, Esquires, proctors for libellants, *and* such hearing is continued until November 23rd, 1882, at 10 o'clock a. m.

United States District Court, District of Minnesota. Term Minutes, October Term, A. D. 1882.

THURSDAY MORNING, *November 23rd*, 1882.

Court opened pursuant to adjournment.
Present: Hon. R. R. Nelson, judge.

(Title of case.)

This cause came on to be heard, and Williams & Davidson, Esquires, appeared as proctors for libellants and O'Brien & Wilson, Esquires, as proctors on the part of the respondents, and such hearing was commenced.

United States District Court, District of Minnesota. Term Minutes, October Term, A. D. 1882.

415 FRIDAY MORNING, *November 24th*, 1882.

Court opened pursuant to adjournment.
Present: Hon. R. R. Nelson, judge.

(Title of cause.)

This cause came on this day to be heard, and — further argued by Mr. Davidson, on the part of the libellants, and by Mr. C. D. O'Brien, on the part of the respondents, and submitted to the court and taken under advisement.

United States District Court, District of Minnesota. Term Minutes, October Term, A. D. 1882.

WEDNESDAY MORNING, *November 29th*, 1882.

Court opened pursuant to adjournment.
Present: Hon. R. R. Nelson, judge.

(Title of case.)

And now, the court having considered the above cause heretofore submitted and filed its opinion therein, ordered that the libel herein be dismissed and that the respondents recover — and from the libellants their costs herein, to be taxed, and that they have execution therefor.

416 United States District Court, District of Minnesota.

(Title of cause.)

The libellants appeal from the final decree of the court in this cause to the next circuit court.
Dated Dec. 8th, 1882.

WILLIAMS & DAVIDSON,
Proctors for Libellants.

(Endorsed:) Filed Dec. 9th, 1882. Wm. A. Spencer, clerk.

United States District Court, District of Minnesota.

(Title of case.)

Whereas an appeal has been or is about to be taken from the decree of this court made on the 29th day of November, A. D. 1882, in a certain cause where Isaac G. Baker, William G. Conrad, and Charles E. Conrad are libellants against Thomas C. Power, James McGarry, William M. Rees, Andrew M. Johnson, and Joseph H. McKnight, respondents, in favor of said respondents and against said libellants:

Now, therefore, the stipulators undersigned hereby stipulate in the sum of one thousand dollars to pay all damages and costs which shall be awarded against the said appellants by the final decree rendered by the appellate court.

HENRY L. WILLIAMS.
417 JAMES H. DAVIDSON.

Taken and acknowledged this 8th day of December, 1882, before me—

[SEAL.] HENRY P. GOODENOW,
Notary Public, Ramsey County, Minnesota.

DISTRICT OF MINNESOTA:

Henry L. Williams and James H. Davidson, parties to the above stipulation, being duly sworn, do*th*, each for himself, depose and say that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

JAMES H. DAVIDSON.
HENRY L. WILLIAMS.

Subscribed and sworn to before me this 8th day of December, A. D. 1882.

[SEAL.] HENRY P. GOODENOW,
Notary Public, Ramsey County, Minnesota.

(Endorsed:) Filed Dec. 9th, 1882. Wm. A. Spencer, clerk.

418 Circuit Court of the United States, District of Minnesota.

ISAAC G. BAKER, JOHN F. MASSIE, WILLIAM G. CONRAD, and CHARLES E. CONRAD, Appellants,

vs.

THOMAS C. POWERS, JAMES MCGARRY, WILLIAM M. REES, ANDREW M. JOHNSON, and JOSEPH H. MCKNIGHT, Appellees.

To the honorable the circuit court of the United States for the district of Minnesota:

The appeal of the above-named appellants respectfully showeth that on or about the 15th day of July, in the year eighteen hundred and eighty-one, the above-named libellants, Isaac G. Baker, John T. Massie, William G. Conrad, and Charles E. Conrad, exhibited their

libel in the district court of the United States for the district of Minnesota against the appellees, claiming over fifty ($50) dollars; praying, among other things, for the reasons set forth in said libel that the appellees might be condemned to pay the demand of the said libellants and costs in said libel mentioned.

That process issued out of said court having been served on Thomas C. Power, one of the appellees, the said appellees did thereupon appear in said district court, and on or about the 28th day of July, in the year 1881, filed their answer to said libel in the said district court, praying that the said libel be dismissed with their
419 cost in that behalf, as by reference to said libel and said answer may more fully appear.

That the said cause came on to be heard before the Hon. R. R. Nelson, judge of the said district court, on the 23rd day of November, A. D. 1882, upon the depositions and proofs taken in said cause and the testimony and proof adduced by the respective parties, and said judge, having advised thereon, on the 29th day of November, in the year 1882, made a decree and sentence in said cause whereby it was, among other things, sentenced and decreed that the said libel be dismissed with costs, as by reference to the said decree may more fully appear.

And these defendants are advised and insist that the said decree is erroneous, inasmuch as the said libellants were entitled to the sums mentioned and demanded in said libel and costs therein mentioned.

And these appellants, for these and other reasons, appeal from the whole of said decree in favor of the said appellees to the next circuit court to be held in the said district, and in the said appeal they intend only to have the said cause heard anew on the same pleading and the same proof, and they pray that the record and proceedings may be returned to the said circuit court, and they pray that the said decree and every part thereof may be reversed, with costs, or such other decree thereupon made as to the said district court shall seem just, and that said appellees be condemned to pay to these appellants their damages and costs in the premises.

WILLIAMS & DAVIDSON,
Proctors for Appellants.

420 United States Circuit Court, District of Minnesota.

(Title of cause.)

It is hereby stipulated by the parties hereto that the same may be submitted to the court upon briefs.

The libellants may have twenty days from date hereof in which to prepare and serve their brief.

The respondents may have twenty days from the service of such brief in which to prepare their brief, and the libellants may have

twenty days thereafter in which to prepare their brief in reply, if so advised.

Dec. 19, 1882.

WILLIAMS & DAVIDSON,
Proctors for Libellants and App'ts.
O'BRIEN & WILSON,
Proctors for Respondents.

(Endorsed:) Filed Jan. 10th, 1883. H. E. Mann, clerk, by O. J. Reynolds, deputy.

Appeal from District Court.

In the Circuit Court of the United States, District of Minnesota. February —, 1883. Admiralty.

(Title of case.)

McCRARY, *Circuit Judge:*

I concur in the opinion of the district court, that the collision and injury complained of was the result of mutual faults,
421 but I am constrained to hold that decree dismissing the libel was erroneous. Upon the authority of Atlee *v.* Packet Co., 21 Wall., 389 (which like this was an action in admiralty *in personam*), I hold that the damages are to be divided according to the admiralty rule, and that the common-law doctrine of contributory negligence has no application. The decree dismissing the bill is accordingly reversed, and the cause will be referred to H. E. Mann, as commissioner under admiralty rule 44, to examine the proofs on file and to report to the court the amount of damages to be divided.

[Endorsed:] Filed March 2, 1883. H. E. Mann, clerk, by O. J. Reynolds, deputy.

Appeal from Dist. Court.

United States Circuit Court, District of Minnesota. In Admiralty.

(Title of cause.)

The undersigned, to whom this cause was referred, as commissioner under admiralty rule 44, to examine the proofs on file and to report to the court the amount of damages to be divided, hereby designates and appoints Tuesday, the 13th day of March, A. D. 1883, at 10 o'clock a. m., as the time, and his office, in the United States custom-house, in the city of St. Paul, in said district, as the place, when and where the parties will be heard, if they so desire, upon the matter of such reference, and this appointment being made on
422 motion of appellants, the undersigned, commissioner as aforesaid, directs and orders that notice of the said hearing and of the time and place so designated and appointed therefor be served on the respondents or their proctors at least four days previous to the said time.

St. Paul, Minnesota, March 6, 1883.

H. E. MANN,
Commissioner.

(Endorsed:) Filed March 7, 1883. H. E. Mann, clerk, by O. J Reynolds, deputy.

Appeal.

Circuit Court of the United States, District of Minnesota. Admiralty.

(Title of cause.)

FEBRUARY, 1883.

Upon the petition of respondents a rehearing in this case is granted upon the question whether the damages should be divided, and the case is set down for such reargument at the next term. The order of reference will be suspended pending the rehearing.

If Mr. Justice Miller is present at the next term I specially desire that he will hear the reargument.

GEO. W. McCRARY.

(Endorsed:) Filed March 8, 1883. H. E. Mann, clerk.

423 Circuit Court of the United States for the District of Minnesota. In Admiralty.

(Title of cause.)

This cause having been duly referred to H. E. Mann, Esq., commissioner, to ascertain and report the amount due the appellants, pursuant to the decision of the court, and said commissioner having made and filed his report and no exceptions thereto having been filed, on motion of Williams & Davidson, proctors for appellants, it is hereby ordered that said report be, and the same is hereby, in all things confirmed, and decree will be rendered accordingly.

Sept. 5th, 1883.

GEO. W. McCRARY.

(Endorsed:) Filed Sept. 5th, 1883. O. B. Hillis, clerk.

(Contents of com'r's report, see page 243.)

424 United States Circuit Court, District of Minnesota. Term Minutes, December Term, A. D. 1882.

TUESDAY MORNING, *December* 19, 1882.

Court opened pursuant to adjournment.

Present: Hon. R. R. Nelson, judge.

(Title of cause.)

By argument of the proctors for the different parties, this cause is submitted to the court upon briefs to be furnished.

United States Circuit Court, District of Minnesota. Term Minutes, June Term, A. D. 1883.

THURSDAY MORNING, *July* 19, 1883.

Court opened pursuant to adjournment.
Present: Hon. Samuel F. Miller, circuit justice.

(Title of cause.)

This cause having heretofore been argued and submitted upon a rehearing ordered by Judge McCrary, now, the court having fully considered the same and being fully advised in the premises, it is ordered that the decree and order of reference heretofore made in this cause do stand, and that the damages be divided pursuant to said decree, and that the hearing of the proofs regarding damages be, and is hereby, referred to H. E. Mann, commissioner.

425 United States Circuit Court, District of Minnesota. Term Minutes, June Term, A. D. 1883.

FRIDAY MORNING, *July* 20, 1883.

Court opened pursuant to adjournment.
Present: Hon. Samuel F. Miller, circuit justice.

(Title of cause.)

This day come the libellants herein, by their proctors, Williams & Davidson, and move the court for an order allowing them to recover costs incurred in this case to date. Said motion being fully submitted and the court being fully advised in the premises, it is ordered that said libellants be, and they are hereby, allowed costs, and that they have execution therefor.

United States Circuit Court, District of Minnesota. Term Minutes, June Term, A. D. 1883.

MONDAY MORNING, *October* 15*th*, '83.

Court opened pursuant to adjournment.
Present: Hon. R. R. Nelson, judge.

(Title of cause.)

A rehearing having been granted herein and the same having heretofore, to wit, on the 14th day of July, A. D. 1883, been heard by Mr. Justice Miller at this term of this court, to wit, upon the pleadings, proofs, and arguments of proctors for appellants and respondents, and after due consideration thereof, and being fully advised in the premises, he having sustained the decree
426 reversing the decree of the United States district court heretofore made and rendered herein, now, in consideration of the aforesaid premises, it is ordered, adjudged, and decreed by the court as follows, to wit:

That the report of H. E. Mann, Esq., a commissioner of this court, to

whom this cause was referred under admiralty rule 44 to examine the proofs on file and to report to the court the amount of damages to be divided, be, and the same is hereby, in all respects confirmed.

That the (libellants) appellants, Isaac G. Baker, John T. Massie, William G. Conrad, and Charles E. Conrad, do have and recover of and against the respondents, Thomas C. Power, James McGarry, William M. Rees, Andrew M. Johnson, and Joseph H. McKnight or any or either of them the sum of nine thousand and forty-three dollars and ninety-five cents ($9,043.95), said sum being the amount, together with interest on same to date, by the commissioner reported to be one-half (½) the damages sustained and due the aforesaid appellants from the aforesaid respondents, together with full costs, taxed at five hundred and twenty-eight dollars and eighty-seven cents ($528.87), and have execution therefor.

427 United States Circuit Court, District of Minnesota. In Admiralty.

ISAAC G. BAKER *et als.*, Libellants,

vs.

THOMAS C. POWER *et als.*, Respondents.

Whereas the report of H. E. Mann, master, duly appointed by the court to ascertain and report the value of the steamboat and the damages to the same by reason of the facts contained in the libel, has been lost or mislaid and cannot be found among the files in said cause, it is hereby stipulated and agreed by and between said libellants and respondents that said master's report, if produced, would show the following results, to wit:

Value of boat		$11,000
Expense of raising same	$4,335 55	
Less salvage	1,093 00	
		3,242 55
Add interest on ½ of $11,000 from —— 17, '79, to Aug. 10, '83		1,437 34
Add interest on one-half of $3,242.55 from Feb'y 17, 1870, to Aug. 10, '83		395 34
Add int. on same from August 10th to Oct. 15th, 1883		90 00
Making a total of		$9,043 95

Which sum is hereby agreed to be the sum or amount of damages found by said master, with interest thereon to time of entry of judgment, on Oct. 15, 1883.

WILLIAMS & DAVIDSON,
Proctors for Libellants.
O'BRIEN & WILSON,
Proctors for Respondents.

Endorsed: Filed Oct. 3, 1884. O. B. Hillis, clerk.

428 UNITED STATES OF AMERICA, *District of Minnesota*, } ss:

Circuit Court of the United States.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 243 pages, numbered consecutively from 1*a* to 243, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final decree, and all other proceedings in said cause and of the whole thereof as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 9th day of Oct., in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth year.

[Seal U. S. Circuit Court, Dist. of Minnesota.]

OSCAR B. HILLIS, *Clerk*.

[Endorsed:] United States circuit court, district of Minnesota. —— *vs.* ——. Return to Supreme Court.

429 In the United States Circuit Court for the District of Minnesota. In Admiralty.

ISAAC G. BAKER, JOHN T. MASSIE, WILLIAM G. CONRAD, and Charles M. Conrad, Owners of the Steamer Col. McLeod, Libellants,

vs.

THOMAS C. POWER, JAMES MCGARRY, WILLIAM M. REIS, ANDREW M. Johnson, and Joseph V. McKnight, Late Owners of the Steamer Butte, in Case of Maritime Tort, Respondents.

To the honorable the Supreme Court of the United States:

The appeal of the libellants respectfully shows that on the first day of July, 1881, the above-named libellants duly filed their libel in the district court of the United States in and for the district of Minnesota in a cause, civil and maratime, for the recovery of damages alleged to have been sustained by said libellants to the steamer "Col. McLeod" by reason of the alleged negligence of said respondents. The respondents duly filed their answer to said libel, and the said libellants replied thereto, and such proceedings were had in said cause that, on the 29th day of November, A. D. 1882, a decree was entered by said district court in and for the district of Minne-
430 sota dismissing said libel; thereupon said libellants duly appealed said cause to the United States circuit court in and for said district; thereupon such proceedings were had that, on the 15th day of October, 1883, a judgment was entered in favor of said

FILED.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 157.

THOMAS C. POWER ET AL.,
Appellants,

vs.

ISAAC G. BAKER ET AL.

No. 307.

ISAAC G. BAKER ET AL.,
Appellants,

vs.

THOMAS C. POWER ET AL.

Appeals from U. S. Circuit Court, District of Minnesota

JAMES H. DAVIDSON,
Proctor for Libellants.

H. L. WILLIAMS,
Counsel.

The facts as found by Judge Nelson (page 217) and concurred in by Judge McCrary (page 223 of Record) are substantially: The libellants were owners of the steamer McLeod, and the respondents were owners of the steamer Butte. That a collision occurred between the vessels in the Missouri River, by which the steamer Col. McLeod was sunk.

The steamer Butte was partly hauled on certain marine ways for repairs, being dismantled and having on board as watchman the mate of the vessel during the previous season of navigation.

The owners had entered into a written contract with the persons in charge of the marine ways for hauling the vessel out, the terms of which contract are not material.

The steamer Col. McLeod had been put in charge of the same person, who hauled out the Butte for the purpose of hauling her out, and had been dropped down to the landing in front of the ways, and laid just at the foot of the same, dis mantled.

These ways are built and used for the purpose of repairing the hulls of vessels, and are located on the land. The timbers gradually incline or slope to the river bank, and run partly into the river, or to the edge, so that vessels can be hauled out and put on them broadside.

The act of hauling out a vessel broadside upon them requires the exercise of great care and caution.

On the 17th of November, 1879, when the steamer Butte was partly hauled upon the ways as stated, and the steamer McLeod was in front preparatory to being hauled out, the shores or props sustaining the Butte being insufficient to hold her in position, she slid down into the river and collided with the Col. McLeod, inflicting such injury that the latter was wrecked and sunk.

The negligence of the contractors, who hauled out the Butte, is conceded, and at the time of the collision a watchman was on board of the vessel, appointed and designated by the master. In fact the master was present when she was hauled out, and knew her position and how she was propped and stayed.

The steamer Col. McLeod had laid up after her last trip

near the marine ways, and the master in charge had consented that the vessel should be removed from her position above to a point directly in front of them for the purpose of having her hauled out.

The master was responsible for the position taken by the vessel, and his consent was sufficient to bind the owner. He was not only present when she was dropped down, but assented and left the watchman in charge, and also the former pilot, and both knew the situation of the steamer Butte.

The District Court found that this was contributory negligence, and that therefore the libellants could not recover.

Upon appeal by libellants the Circuit Court adopted the opinion of the District Court, except in the matter of damages, holding that the damage should be equally divided. Record 223.

By order of the Circuit Judge a rehearing was ordered before Associate Justice Miller (p. 224). The cause was reargued and the decision of the Circuit Court affirmed (p. 225.) The cause was referred to a master to assess the damages, and upon the coming in and confirmation of his report a decree was entered (p. 225) in favor of libellants for one-half the damages.

Both parties appealed. No bill of exceptions was made. Defendants claim that they are not liable:

1. Because there was contributory negligence.

2. Because the injury was done by a contractor employed by them.

The libellants upon their appeal (No. 307 on cal.) state as

ASSIGNMENT OF ERROR,

That the Circuit Court erred in holding that it was negligence for libellants to allow their steamer to be placed in front of the ways, under the circumstances. There was no apparent danger. It was not necessary to anticipate the negligence of those in charge of the Butte.

Brief of Argument for Libellants.

As we understand the statute and the rulings of the Court, the evidence should not have been returned or printed. The only question before the Court is: Do the findings of the Court justify the decree? We claim that we are within the rule stated above.

There was nothing to indicate that the Butte was not properly secured.

The men on the steamers thought there was no danger or they would not have remained on board and risked their lives.

No one who had anything to do about the ways thought there was any danger.

The master of the McLeod had no reason to believe there was any risk.

A party is not guilty of negligence in exposing himself or property unless he has reason to believe there is danger.

Carroll vs. M. V. R. R. Co., 14 Minn., 64.

Dobiecki vs. Sharp, 88 N. Y., 203–210.

There was nothing to show to one merely looking at her that she was negligently stayed.

The case of Cook vs. C. T. Co., 1 Denio, 94, is somewhat like this.

There the plaintiff constructed a mill in a position exposed to fire from the defendant's steamers. Plaintiff's property having been destroyed by fire escaping from the defendant's boat, it was strenuously insisted that by reason of such act on the part of the plaintiff there could be no recovery in the case.

It was held, however, that where one in the lawful use of his own property exposed it to accidental injury from the lawful acts of another, he does not thereby lose his remedy for the injury caused by the culpable negligence of such other persons. The court say (page 99): "The property destroyed was in an exposed and hazardous condition, and therefore in more than ordinary danger from merely accidental fires; this risk the plaintiffs assumed, but not the risk of another's negligence.

"There must be some wrongful act or culpable negligence on the part of the plaintiff to bar him on this principle, and

neither can be affirmed of another for simply occupying a position of more or less exposure on his own premises.

"I refer to no authorities on this part of the case, for in my opinion none are required.

"We may run through every imaginable variety of positions, some of more and some of less exposure and hazard, and we must at last come to a conclusion that while a person confines himself to lawful employment on his own premises, this position, however injudicious and imprudent it may be, is not, therefore, wrongful, and that this want of due care or judgment in its selection can never amount to negligence, so as thereby to deprive him of redress for the wrong done to him by another."

The case of Brown vs. Lynn, 31 P. St., 510, is a case we think directly in point.

The facts in that case were: The river was rising; the plaintiff knowing that fact and how defendant's boats were fastened, removed his boat from above the defendant's barges and moored it immediately below the defendant's barges. The rising river swept away defendant's barges, which were improperly secured, and caused the injury for which the action was brought.

The defendant's counsel requested the court to charge the jury, *inter alia*, as follows:

1. "That if they find that the plaintiff was aware of the kind and character of the lines with which the defendant's barges were fastened, and if he believed them insufficient to safely hold defendant's barges, and with this knowledge and belief placed his boat immediately below defendant's barges, then the plaintiff cannot recover.

2. "That if the plaintiff had full knowledge of the kind and amount of fastening which held defendant's barges, and placed his boats immediately below the barges, when he could have taken them to other places out of danger, then he took upon himself the risk, and if his boats were injured the same day by the barges breaking loose, he is not entitled to recover.

3. "That if the plaintiff removed his boats from the outside of the defendant's barges where they had been fastened by a line to the shore, and placed them below the barges, knowing

that the barges were in danger of breaking loose and injuring them, when he could have placed them out of danger, then he cannot recover, although the amount of care subsequently bestowed by the defendant was not sufficient to prevent the rising river from sweeping off the barges and injuring plaintiff's boat."

The court below (Williams, J.,) charged the jury as follows:

"The defendant was bound to use ordinary care, skill and diligence in fastening his barges to the shore where they were moored. * * * * * * If the danger be greater and threatening, then a high degree of skill and care is requisite in order to avoid or prevent it; and in case of great danger, great care and caution will be but ordinary care. But if the circumstances are such that but little risk or danger may be reasonably apprehended, then a much less degree of care will be ordinary care. * * * * * * * * *

"The plaintiff moored his boats, according to the evidence, early in the morning of the day of the accident, soon after the river had commenced to rise.

"If the plaintiff knew that the defendant's lines or cables were not sufficient to hold the barges in case the river should rise the way it did, he was not bound to presume that the defendant would suffer his barges to remain with insufficient fastening during the rise, but he might presume that the defendant would use ordinary care in securing and fastening his barges in order to prevent them from being swept off by the rise, and the plaintiff would be justified in acting upon this presumption; and if his boat was lost by the continued negligence of the defendant in failing properly to secure and fasten his barges after the river began to rise, he may recover.

"The defendant cannot set up his own negligence to shield himself from responsibility for plaintiff's loss if occasioned by his negligence.

"The rule for which the defendant contends would prevent the owners of boats from mooring them below boats insecurely fastened."

To this charge the defendant excepted; and a verdict and judgment having been rendered against the defendant, he removed the cause to the Appellate Court and there assigned

for error: The refusal to charge as requested in the defendant's first, second and third points.

The decision of the Supreme Court was:

"We overrule the exceptions to the charge of the court in answer to the defendant's points upon the view of the learned judge on the law of the case, so accurately laid down to the jury in his charge, in which they are fully answered."

We affirm that the master of the McLeod did what any prudent man would have done under the circumstances.

His boat had been injured; it was of vital importance to him to have her hauled out before she was caught in the ice.

It was in a high northern latitude; the river was liable to freeze any night at that season of the year. It was his duty to get her out of the river as soon as he could.

It would have been an act of imprudence not to have availed himself of the opportunity to commence work on the afternoon of the 17th of November.

If he could not have done it then, when could he have safely commenced work?

If she had been caught in the ice and the Butte had not slipped off the ways and Capt. Murphy had been called to account for his remissness in not getting his boat in front of the ways the day before, would it have been any answer on his part that perhaps those in charge of the Butte would be negligent? Would it have been his duty to employ an expert to examine how the Butte was secured?

Sherman and Redfield on Negligence, sec. 31, and authorities cited.

He exercised the same skill and care that men in his calling usually exercise.

"Plaintiff is not debarred from recovering for his injury if he has adopted the course which most prudent men would take under similar circumstances."

Sherman & R. on Neg., sec. 31.

It is not a question whether there was in fact any danger, but whether a man of ordinary prudence would have had reason to anticipate danger. That a man of ordinary prudence would not have anticipated danger we think is conclusively shown by the conduct of all parties in the vicinity.

If the master of the McLeod was guilty of want of ordinary prudence, the master of the Butte was, for leaving his boat in such a position, and the party operating the ways and the persons who remained on the boats.

We think any prudent man situated as he was would have done as he did.

He had no reason to suspect that the owners of the Butte or Weaver had been or would be guilty of negligence.

He had reason to believe that those who were or ought to be skilled in the business had or would properly do the work they had undertaken.

He had a right to expect either that the boat was secured beyond all danger, or if not she would be.

If he had been skilled in that kind of work, and had gone and examined the Butte, and thought she was improperly secured, he could do nothing about it.

He must run the risk of having his boat caught in the ice or haul her out.

There was nothing to indicate that the Butte would slip off the ways that night. She had remained for several hours apparently secure. She was apparently in her berth.

It is not what the result showed was the most prudent course, but whether, situated as the party was, he did what no prudent man would have done.

Those in charge of the Butte could have secured her after the McLeod was placed at the foot of the ways.

"It is now well settled that the plaintiff may recover, notwithstanding his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him."

Sherman & Redfield on Negligence, sec. 36, and authorities cited.

"If A has negligently exposed his property to injury and B has negligently injured it, B must pay the damage to A, if B, by exercising ordinary care, could have avoided injuring it."

Davies vs. Mann, 10 M. & W., 545; reported at length in vol. 2, Thompson on Neg., 545. It is there reported as the leading English case on the question of contributory negligence.

In Radley vs. L. & N. W. R. R. Co., reported in full, 2 Thompson on Neg., 1108, it was held: "Though the plaintiff may have been guilty of negligence, and although that negligence may have in fact contributed to the act which is the subject of the action, yet if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

"If A moors his boat below a point in the river where B has moored his barges, and B's barges, through the negligent manner in which they are moored, break away and strike A's boat and sink it, A may recover damages of B. The place where A moored his boat was a safe place but for B's negligence."

Brown vs. Lynn, 31 Penn. St., 510, *supra.*

See, also, Wharton on Negligence, sections 323, *et seq.*, where many of the decisions are carefully collated.

Upon the other point raised by the defendants that they are not liable because the acts complained of were done by a contractor, the decision of the District and Circuit Courts was against the defendants.

The vessel and her owners are liable if she was not properly manned and managed.

The owners are liable, although the vessel may be in charge of a pilot.

"If the act undertaken is one from its very character a nuisance, or one dangerous to others, the person undertaking it is not released from his responsibility to any person thereby injured, although he has entered into a contract with some person to perform it, and the injury was caused through the negligence of the contractor."

Moaks' Underhill on Torts, 277.

The work proposed in this case was both a nuisance and dangerous.

"Whoever materially obstructs it (the highway) or renders its use hazardous by doing anything above, upon or below the surface, is guilty of a nuisance."

Congrave vs. Smith, 18 N. Y. 79.

"Any act of an individual done to a highway, though performed on his own soil, if it detract from the safety of travel, is a nuisance."

Dygest vs. Schenck, 23 Wend. 447.

Approved in 101 Mass. 253.

The work proposed, viz.: Placing a large steamer upon an inclined plane smeared with grease, on the bank of a navigable river, in freezing weather, renders navigation more hazardous and is a nuisance.

"Where the obstruction or defect which occasions the injury results directly from the acts which a contractor agreed and was authorized to do, the person who employs the contractor and authorizes him to do those acts, is equally liable to the injured party."

Water Co. vs. Ware, 16 Wal. 576.

"Where work done on a public highway necessarily constitutes an obstruction or defect in the highway, which renders it dangerous as a way unless properly guarded, in such case he for whom the work was done cannot defeat the claim of him who has suffered injury, by proof that the work which constituted the obstruction or defect was done by an independent contractor."

Robbins vs. Chicago, 4 Wal. 657; S. C. 2 Black 418.

If the thing to be done is attended with danger, the rule claimed by the respondents is not applicable.

Thompson on Neg. 899.

A contractor of a railroad company, in blasting, injured the plaintiff, the railroad company was held liable.

Stone vs. Cheshire R. R. Co., 19 N. H. 427.

Carmen vs. L. I. R. R. Co., 4 Ohio N. S. 399.

Those about to launch a vessel are bound to give reasonable notice and exercise great care.

"The Vienna," Swabey's Adm. 405.

"The launch of a ship is an extraordinary and unusual proceeding, and the builder is therefore required to take extraordinary care and exercise the highest caution to prevent damage to those navigating the harbor."

Walster vs. Humphreys, 3 Fed. Rep. 535.

If one constructs a house with such a pitch to the roof that

the snow slides off and injure a person passing in the street, he is liable.

Shipley vs. 50 Associates, 106 Mass. 194. See same case 101 Mass. 251.

The fact that the owner employs a contractor does not alter the rule.

Gorham vs. Gross, 125 Mass. 232, and cases cited.

"The man who orders work to be executed, from which in the natural course of things injurious consequences to his neighbors must be expected to arise, unless means be adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else, whether it be a contractor employed to do the work from which the danger rises, or some independent person to do what is necessary to prevent the act which he has done from becoming wrongful."

Bower vs. Peas, The Law Reports, 1 Q. B. 321.

"When work is being executed from which danger may arise to others, and it thereby becomes incumbent on the parties doing it or ordering it to be done, to take measures to prevent damage resulting to others, he cannot divest himself of liability by transferring the duty to a contractor." (S. C. page 329.)

In this case and in the natural course of things injurious consequences would happen if the Butte should slide off the ways into the river. And it became incumbent upon her owners to take measures to prevent such damage resulting to others, from the slipping of the steamer off the ways. And they cannot divest themselves of liability by transferring the duty to a contractor.

"The Ruby Queen," Lushing's Adm. Report, 266, referred to by Nelson J., in his decision, is directly in point.

"The ship of the defendant is liable for the act of the contractor in sole charge of the ship."

The leading English case is Fletcher vs. Ryland, 1 L. R. Exch. 265; S. C. 3 H. of L. E. and I. App. 330. (Reported in full, 1 Thompson on Neg. 1.)

There the defendant employed a competent engineer and

contractor to construct a reservoir for water upon the land of a third person, but with his consent. The contractor did not use proper care and skill and the water broke through an old shaft in the plaintiff's land into his mine and injured it. Held that the defendant was liable; and it was no defense that he hired a competent contractor.

"He who brings upon his land anything which would not naturally come there, and which is in itself dangerous and may become mischievous if not kept under control, though in so doing he may act without passion, willfulness or negligence, will be liable in damages for any mischief that may occur." (Syllabus.)

The Court say: "We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects (keeps) there anything likely to do mischief if it escapes, must keep it in at his own peril. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps, the act of God. A person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the neighbor who has brought something on his own property that was not naturally there, harmless to others so long as it is confined to his property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which arises if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue or answer for the natural and anticipated consequences, and upon authority this, we think, is established to be the law, whether the things so brought be beasts, water, or filth, or stenches. There does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or

stenches, *or any other thing* which will, if it escapes naturally, do damage; to prevent their escaping and injuring his neighbor, it is his duty to keep them in at his peril."

The point was distinctly raised, that defendant was not liable because he employed competent contractors to do the work. The House of Lords affirmed the judgment of the Court below.

Lord Cranworth says: "If a person brings or accumulates on his land anything, which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage he is responsible, however careful he may have been, and whatever precaution he may have taken to prevent the damage."

This decision has been generally approved by the American Courts.

In the case at bar, it is not necessary to go to the extent of Fletcher & Ryland.

The defendants knew that if their steamboat escaped it might and probably would do damage, and they knew it would escape if not properly secured, and injure any vessel which might be in its path.

There are many English and American cases similar to the one at bar, where the owners have been held liable under similar circumstances.

See Hole vs. S. & S. R'y Co., 6 Hurl & Norm, 488, cited 61 N. Y. 190.

"If a contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself."

In this case the defendant employed a contractor to erect a bridge. The work was lawful, but negligently done. The R. R. Co. was held liable.

In Pickett vs. Smith, 10 C. B. N. S. 470, referred to in 61 N. Y. 192, the servants of a coal merchant left a coal hole unguarded and a passer fell in and was injured. *Held* that the owner of the premises was liable.

"The defendant having caused the danger was bound to take reasonable means to prevent mischief. The performance of his duty he omitted, and the fact of his having intrusted it to a

person who also neglected it, furnishes no excuse either in good sense or law."

"When the act itself causes injury, the person who ordered it is responsible, but where the injury happened from something collateral in the course of carrying out the order, he is not responsible. The contractor's servant, through carelessness while engaged in the constructing of railroad works, allowed a brick to fall upon a person passing along the highway. The company was held not responsible. The act was plainly collateral. Suppose the contractor had been employed to drop bricks, with the injunction to be careful, would the rule have been the same? I think not."

61 N. Y. 203.

In this case the contractor was employed to haul the boat out and put her back. He was careless in the matter of hauling her out, not properly securing her, and he let her slide back without warning. The fact that he did not intend to let her slip is immaterial.

In Tanny vs. Ashton, 1 Q. B. Div. 314, the defendant employed a person to put up a hanging lamp; it fell and injured a passer. Held the owner was liable.

In Randlesson vs. Murry, 8 Ad. & Ell. 109, a warehouseman at Liverpool employed a master porter to remove a barrel from his warehouse. The master porter employed his men and tackle, and through the negligence of the men the tackle failed and the barrel fell and injured the plaintiff. Held the warehouseman was liable.

In cases where the plea of no negligence on the part of the defendant is not a good defense, it will not avail to plead negligence of the contractors.

Many examples from every day life will readily occur to illustrate this principle, in addition to these mentioned or referred to above. One cannot escape the risk incident thereto by employing another to hoist a heavy iron safe over a street, or haul it up an inclined plane to the upper stories of his building, or to drive a wild beast through the streets, or anything likely to frighten horses and thereby injure others, or construct a wall or chimney likely to fall, or run railroad trains over a dangerous crossing.

The true rule is, "when the very thing contracted to be done is improperly done, and causes the mischief, * * * the employer is responsible for it."

Gorham vs. Gross, 125 Mass. 232.

On the hearing of this case in the Circuit Court we understood the counsel for the respondent to concede the general principle to be as stated above, but to claim an exception to the general rule in this case, because, as they said, both vessels were in charge of the same contractor. We are unable to see why that should make any difference, if true. We confidently affirm, however, that such is not the fact. The contractor was not in charge of either steamer; at most he had the right to fasten to and move the Butte to some other point on the ways. He was not in possession of her. He had no right to step into her cabin or allow any one else to go aboard, or remove any one from her. He simply had a right to go on deck, if necessary, to accomplish the work he had undertaken to do. The owners of the vessel were in possession, by their agents, the master and mate.

The contract contemplated that the owners should have some one in charge on board all the time.

It provided that Weaver should haul the Butte out and put her back in the river, "*first giving three days notice to the party in charge on board.*" If the master or mate had refused to allow him to do even this, his only remedy was an action for breach of contract. No court would have given him possession of the vessel.

As to the McLeod the finding is that her master allowed her to be placed at the foot of the ways.

That the owners of the McLeod contemplated entering into some contract with Weaver for hauling out their boat, in no manner released the owners of the Butte from the effects of their negligence and carelessness. We have no right to conjecture what contract, if any, would have been made.

In the case of Shipley vs. Fifty Associates, referred to above, an action to recover damages for injuries received from snow falling from a roof, it certainly would have been no defense to that action, that the plaintiff contemplated or had, in

fact, constructed a house with the same defect upon the same street.

If a ship is improperly moored by an insufficient cable and anchor, and breaks loose and drifts against another and injures it, it would certainly be no defense to affirm that the injured vessel was moored by a similar insufficient cable, or that the owners of the injured vessel, under the same circumstances, would have used similar insufficient cables.

The cases cited by the respondents are not in point. Most of them arose out of contracts of towing and are not applicable, not only for the reasons stated by Judge Nelson in his opinion, but also for the reason that towing is not dangerous; neither does it obstruct or render hazardous the highway, and is as different from the case at bar as driving domestic animals through the street differs from driving a wild beast or steam engine through such street.

Many of the cases cited discuss the question of master and servant, "*respondeat superior*," a principle not involved here.

Some refer to vessels belonging to the navy and not applicable here, because in no case can the government be held responsible for the torts of those in charge of its vessels.

Those which appear to be applicable are decisions by the State Courts in conflict with the decisions of the State and Federal Courts cited above, particularly Robbins vs. Chicago, 4 Wall. 678, and Water Co. vs. Ware, 16 Wall. 566.

The decree of the Circuit Court should be modified—libellants should recover full damage, with interest and costs.

In no event should libellants be charged with the cost of the return and printing of the testimony.

JAMES H. DAVIDSON,
Proctor for Libellants.

H. L. WILLIAMS,
Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1897.

THOMAS C. POWER ET AL.,
Appellants,
v.
ISAAC G. BAKER ET AL.,
Appellees.
No. 157.

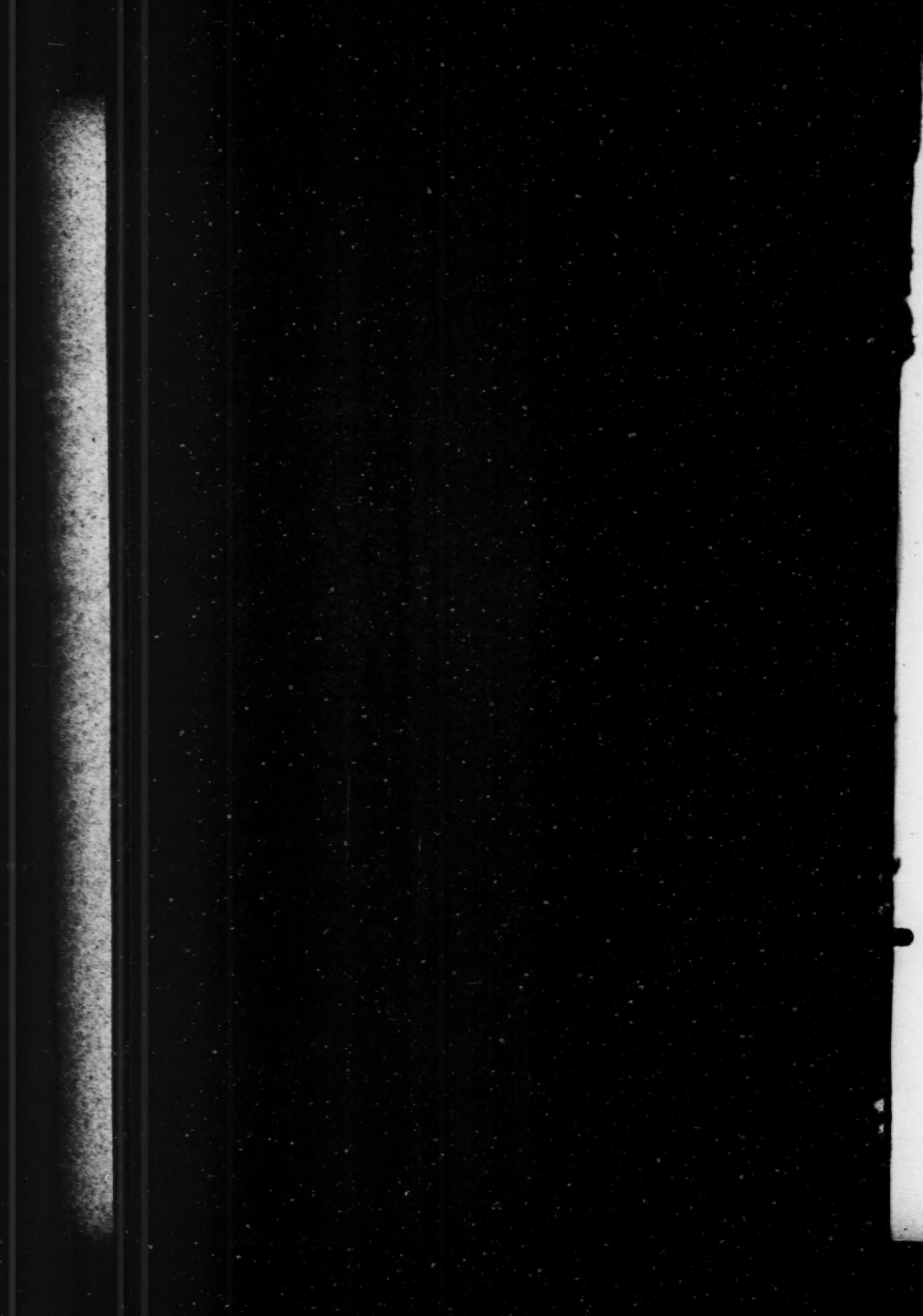
ISAAC G. BAKER ET AL.,
Appellants,
v.
THOMAS C. POWER ET AL.,
Appellees.
No. 207.

APPEALS FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR POWER ET AL.

C. D. O'BRIEN AND
WM. H. BLISS,
Counsel for Power et al.

WASHINGTON:
Gibson Bros., Printers and Bookbinders.
1898.



Supreme Court of the United States.

OCTOBER TERM, 1887.

THOMAS C. POWER ET AL., APPELLANTS,
v.
ISAAC G. BAKER ET AL., APPELLEES. } *No.* 157.

ISAAC G. BAKER ET AL., APPELLANTS,
v.
THOMAS C. POWER ET AL., APPELLEES. } *No.* 307.

Brief and Argument on behalf of Thomas C. Power et al., *Appellants and Appellees.*

STATEMENT OF THE CASE.

The question involved in these appeals, which are cross-appeals, is whether or not the legal conclusions of the circuit court of the United States for the district of Minne-

sota are warranted by the facts found by the district court upon the trial of the cause before it.

Isaac G. Baker *et al.*, owners of the steamer *Col. McLeod*, filed a libel in admiralty in the United States district court for the district of Minnesota, *in personam*, against Thomas C. Power *et al.*, owners of the steamer *Butte*, in a cause of action, civil and maritime, alleging that by reason of a collision between the two vessels, in which said libellants claim the *Butte* and her owners were at fault, they had suffered damages in the amounts claimed in their libel. Issue was joined in the district court, and the testimony being taken, the conclusions of fact were found by the judge of that court, and appear upon pages 217 and 218 of the record. There is no dispute as to the facts in the case; no exceptions were filed to any of the findings of fact in the district court, and these findings were afterwards concurred in by the judges of the circuit court of that district upon an appeal taken by the libellants.

The facts which we say are not in dispute, and which sufficiently appear in the findings, are as follows: In 1879 both the *McLeod* and the *Butte* were engaged for their respective owners in the navigation of the Upper Missouri river in the Territories of Dakota and Montana. At Bismarck, in the Territory of Dakota, were certain marine ways constructed and operated upon the bank of the Missouri river at a point below the city of Bismarck, by a copartnership known as Weaver & Co.; and these ways and dock-yard were used for the purpose not only of hauling out and repairing steamboats, but also for hauling them out and keeping them during the winter season, it being necessary and proper to haul all steamboats engaged in navigating the upper Missouri river out upon the land when navigation ceased, and keep them there during the winter months and until the river was fit for navigation in the spring. Neither of the par-

ties to this controversy had any ownership in or authority concerning the ways and dock-yard, which were operated solely by Weaver & Co., the lessees of the same; and none of the firm of Weaver & Co. had any interest whatever in the steamboats referred to, or any business connection with the owners of the same, other than as hereinafter stated.

About the close of navigation in the month of November, 1879, Power & Co., the owners of the steamer *Butte*, caused her to be landed at the port of Bismarck, and shortly thereafter made with Weaver & Co. a written contract, by the terms of which, for a certain compensation to be paid to them, Weaver & Co. agreed with the master of the *Butte*, who was also one of the owners, to haul her out upon the ways at Bismarck, keep her there during the winter, and launch her into the water in the spring (page 14, record). Pursuant to that contract the *Butte* was surrendered by her owners and master to Weaver & Co., who proceeded to haul her out upon the ways of the dock-yard. At the same time the master of the *McLeod* surrendered his vessel to Weaver & Co. under a similar agreement, or understanding, and placed her in their hands, to be hauled out at the same dock-yard and upon the same ways occupied by the *Butte*. Weaver & Co. having thus complete possession and control of both boats, the crews of which had been discharged, proceeded to haul the *Butte* out on the ways of their dock-yard, and on the day, or day before, the accident occurred, had hauled the *Butte* a certain distance upon the ways, when they stopped hauling her, and then dropped the *McLeod* down the river, moored her at the foot of the ways, and placed some tackle upon her, preparatory to hauling her alongside of the *Butte*, and then shifting each of them to her regular berth upon the ways for the winter. While the vessels were in that position, the *Butte* hauled out upon the ways and the *McLeod* moored at the foot of the ways, Wea-

ver & Co. ceased work upon them and left them there for the night in such relative positions; and during the night from some cause, which does not clearly appear, the *Butte* slipped from her position upon the ways and fell upon the *McLeod*, sinking her and causing the damages complained of by libellants.

All the foregoing acts, the placing of the vessels in the relative positions occupied by them, and their care and custody while in such positions, were the acts and doings solely of Weaver & Co., without interference or control by either or any of the owners, masters, or crew of the respective vessels; and both vessels were in the sole and exclusive care and custody of Weaver & Co. prior to and at the time of the accident.

These facts sufficiently appear in the findings of facts of the district judge, on pages 217 and 218 of the record.

It may be that this court will not refer to the evidence, but, if referred to, it will be apparent therefrom that both the placing of the *Butte* in the position she was placed, and the placing of the *McLeod* in the position she was placed, were done by Weaver & Co. for their own convenience, and to enable them more easily to handle the vessels; and further, that the watchman was left by the master of the *Butte* on the vessel at the time she was surrendered to Weaver & Co., for the sole purpose of taking care of her rigging and furniture, and that neither the master nor the watchman claimed or exercised the slightest authority or control over her, after the surrender. (See testimony of C. S. Weaver, Barney Flynn, Jesse MacClenden, and Paul T. Murphy, all witnesses for libellants, pages 135–6–7, 143, 159, 160, 161, 166, 169, and 186, record).

The district court dismissed the libel. Upon an appeal to the circuit court, it was there held that each of the parties to the action—being the owners of the respective vessels—

was guilty of negligence, and that the damages suffered by the *McLeod* should be divided between them. A decree was entered by the circuit court dividing the damages; a motion for a rehearing was made in that court, the cause heard before Mr. Justice Miller, and the former decision affirmed. It is from that judgment and decree of the circuit court that these appeals have been taken; Baker *et al.*, libellants, insisting that upon the findings of fact the full measure of damages claimed to have been suffered by them should be awarded them, and the decree of the circuit court reversed to that extent; Power *et al.*, the defendants in the libel, insisting that the circuit court erred in decreeing any damages against them, and appealing from the decree upon that ground.

Assignment of Error.

Power *et al.*, defendants and appellants, assign for error herein, that the circuit court erred in holding there was any negligence upon their part, and that they were liable to the libellants for any damages, upon the facts found.

Brief of Argument.

The rule has been long and well established, that one who has contracted with a competent person to do certain work, not in itself unlawful or dangerous, according to the contractor's own methods, and without his being subject to control, except as to the results of his work, is not answerable for the wrongs of such contractor or his servants, committed in the prosecution of the work.

The authorities sustaining this rule are very numerous; nearly all, if not all, the principal decisions may be found in note 6, page 899, 2 Thompson on Negligences (1880). More recently, in the case of Little *v.* Hackett (116 U. S.

388), this rule was thoroughly and learnedly considered and supported by this court.

The proprietor, it is conceded, may make himself liable by interfering with the contractor and assuming control of the work, or some part of it, so that the relation of master and servant arises, or so that an injury ensues which is traceable to his interference. But the fact, merely, that he is present during the performance of the work does not make him liable for the wrongs of his contractor. Indeed, the courts have gone even further, and the adjudications are numerous, holding that the mere fact that the proprietor retains a general supervision over the work, for the purpose of satisfying himself that the contractor carries out the stipulations of his contract, does not make him responsible for wrongs done to third persons in the prosecution of the work.

Clark's Admr. *v.* H. & St. J. R.R. Co., 36 Mo., 202–218.
Callahan *v.* B. & M. R R.R. Co., 23 Iowa, 562.
Eaton *v.* E. & N. A. R. R. Co., 59 Me., 520.
Reedie *v.* Ry. Co., 4 Exch., 243.
City of Erie *v.* Caulkins, 85 Pa. St., 247.
Pack *v.* Mayor *et al.*, 8 N. Y., 222.
Nevins *v.* City of Peoria, 41 Ill., 502–515.

The ground upon which the circuit court held the respondents below to be guilty of negligence in this case is not clearly apparent. In neither the findings of the district court, nor in the evidence, is any act of negligence relied upon or pointed out as having been committed by them. The only allusion made in the findings to such negligence is the following paragraph, found on page 218 of the record, being part of the findings of the district court: "The negligence of the contractors who hauled out the *Butte* is con-

ceded, and at the time of the collision a watchman was on board of the vessel, appointed and designated by the master. In fact the master was present when she was hauled, and knew her position, and how she was propped and stayed. These facts fix the liability of the owners, for the persons employed to haul out the vessel are not such independent contractors, although the contract is in writing, that they can shield themselves from the consequence of the contractor's negligence." In this paragraph is found the only suggestion of a basis of liability on the part of Power & Co., and it is submitted that in this paragraph is found also the error of law of which Power & Co. complain, the correction of which will lead to a reversal of the decree against them.

If respondents had the right to make a contract with Weaver & Co., lessees and operators of the dock-yard, by which they surrendered their vessel to them, to be by them removed from her element and placed within the confines of their dock-yard, on land, there to remain under their exclusive control, we cannot conceive how they can be held guilty of negligence in making such contract, or responsible for the acts of Weaver & Co. upon land, in executing it; nor can it fairly be ascertained upon what ground the mere presence of the master of the *Butte*, during the time that Weaver & Co. were engaged in the performance of their contract, could affect the legal rights of the parties.

To sustain the decree of the circuit court in this case it will be necessary to hold that the owners of the *Butte* were liable *in personam* to third parties for all and every act which Weaver & Co. might have committed in connection with their management of the vessel while in their custody, in the dock-yard and upon land. So, if an employee of Weaver & Co. had been injured by defective appliances used in hauling the vessel out, upon this view of the

case Power & Co. would have been liable; so, if the vessel had been negligently set on fire by Weaver & Co. or their employees, Power & Co. would have been liable to any third person who might have been injured by such negligence. In fact, there is no limit, upon this theory, to the liability of the owners of the *Butte* for the acts of Weaver & Co., in connection with the vessel, while in their custody, although committed on land, within the confines of these ways or dock-yard, and in a matter entirely disconnected from the operation or management of the vessel. It therefore follows that this case presents an anomaly in the law, for in no other class of cases has it been held that the mere ownership of the article or property necessarily makes the owner liable for all negligences committed upon, in or about such property, to the injury of third persons, by those to whom the owner has surrendered it. Such, we confidently submit, is not the law.

If, however, it is suggested that the negligence consisted in the placing of the vessel in charge of Weaver & Co., then there can be no recovery, for as to both of these parties Weaver & Co. was a common agent, and their acts as to these parties were common to each. Now, as one cannot well commit a negligence upon himself, it would follow, in reason, that the decree cannot be sustained upon that ground.

In the district court the finding of negligence against Power & Co. seems to have been placed by the court upon the rule adopted in the case of the *Ruby Queen* (Lushington Ad. 266, page 218, Record). But the case at bar can readily be distinguished from that case, as will be demonstrated hereafter. In the brief and argument on behalf of Baker *et al.*, the reason for the asserted negligence and liability of Power & Co. is placed upon other grounds; but a brief examination of the cases cited

in support will show that they are not in point, and that the course of reasoning found in them is inapplicable to the case at bar. And the distinguishing feature of the case at bar from all of the cases cited is found in the fact that the *Butte* had been removed from her natural element and placed upon land, and that the injury to the *McLeod* occurred in an attempt by the same parties who had charge of the *Butte* to place the *McLeod* upon the same ways, out of her element, and within the confines of the dock-yard. Clearly, neither the *Butte* nor her owners, in the then situation of the vessel, owed any duty to the *McLeod* or her owners, in the then situation of the *McLeod*.

Mr. Justice Blatchford—then on the circuit—in the case of the *Germania* (9 Ben. 359), said, in dismissing a libel to recover damages for personal injuries sustained by libellant, by his having fallen through an open hatchway, while engaged in loading the vessel, and in the employ of the shippers of the cargo:

"Here the libellant was not in the employment of the vessel or of her owners, nor acting in their service or for their benefit. He sustained no relation to them by contract. All that can be said is that the accident happened on board of the vessel. But that mere fact cannot remove the difficulty, that in no event could it be held that there was any breach of any maritime duty or obligation on the part of the officers of the vessel.

"The libellant may have been rightfully on the vessel, and not a trespasser, and it may be considered that he was there with the assent of the officers of the vessel; but it by no means follows that the vessel or her owner is liable for what occurred, even though the leaving the hatchway open was a negligent and careless act on the part of some person. There was no contract between any one representing the vessel and the libellant, and there was no duty to the libellant on the part of the officers and crew of the vessel."

Dwyer *v.* National S. S. Co. (17 Blatch. 472).

In the case of the *Ruby Queen* the vessel was in her element. She had been moored by her owner in her berth. Upon him rested the affirmative duty to see that her mooring, tackle and furniture were of such character and so arranged that, while so in her element, she should not injure any vessel which might lawfully be in her vicinity. This was a duty imposed upon her owner by reason of her situation, and from which he could not escape by delegating it to another—least of all by delegating it to a broker in whose charge he had placed her for the purposes of sale—because the employment of the broker was merely for the purpose of obtaining a purchaser for the vessel, and such purpose in nowise involved her care, custody, or management, or relieved the owner from the duty imposed upon him by the fact that she was at anchor in a crowded port. In the case at bar the *Butte* was surrendered to Weaver & Co. to be hauled out, and was, in fact, hauled out, and placed within the confines of their private premises, and the owners of the *Butte*, during the life of that contract, had no more right to interfere with her management, while on land, than they would have had to interfere with the private property of Weaver & Co., or with their methods of managing their ways.

In every case cited by counsel for libellants it will be found that there rested upon the defendant an affirmative duty, arising out of the situation and condition of his property, or the particular act which was being done upon it, by reason of the rights of other persons in the immediate or adjacent vicinity. Such was the case in Carroll *v.* M. V. R. R. Co., 14 Minn., 64; Dobiecki *v.* Sharp, 88 N. Y., 203, 210; Cook *v.* C. T. Co., 1 Denio, 94; Brown *v.* Lynn, 31 Penn. Stat., 510; and all the authorities cited, notably that of Water Co. *v.* Ware, 16 Wallace, 576. In all these cases it will be found that the defendant himself occupied such a position toward the party injured that there was in-

cumbent upon him a duty, the performance of which he could not delegate to another, and the omission to perform which necessarily made him liable, whether the act was done by himself, his servants, or an independent contractor. In Water Co. *v.* Ware the work was being done upon a public highway. In Fletcher *v.* Ryland, (1 Thompson on Negligences, 1) the defendant was engaged in constructing a reservoir, under contract, upon the land of a third person. The contractor did not use proper care and skill, and the water broke through an old shaft into the plaintiff's land into his mine, and injured it. It was held that the defendant was liable, but it was not held that the owner of the land was liable, although he consented to the construction of the reservoir.

A person engaged in the performance of an act which is in itself dangerous is undoubtedly primarily responsible to all who are lawfully in the vicinity and who may be subjected to injury from the negligent performance of the act, because as to those persons he owes a primary and affirmative duty. This court has laid down the rule in the noted case of Chicago *v.* Robbins (2 Black, 418) and Robbins *v.* Chicago (5 Wall., 657), that where work to be done necessarily constituted an obstruction or defect in the street, which rendered it dangerous to travel unless properly guarded or shut out from public use, the principal for whom the work was done could not defeat a just claim for damages by proving that the work which constituted the defect or obstruction was the work of an independent contractor.

But that is not the case at bar. It is not even intimated that the hauling of the *Butte* upon the ways was an act either in itself dangerous or likely to lead to the disaster in question. The disaster was certainly neither the natural result nor the expected consequence of the hauling out. And further, she was not in her element; she was not upon

or in the highway; it is not found, nor is it pretended, that the *McLeod* was at that time engaged in navigating the river, or that she had a lawful right to be docked or berthed at the foot of the ways, except by the procurement or permission of Weaver & Co., and it would seem to extend the rule of legal responsibility beyond all reasonable limits to say that Weaver & Co., controlling and in charge of the entire situation, could take our vessel, place her in their private premises, take the *McLeod*, bring her upon, or in the immediate vicinity of, those premises, and then, by their negligent act, commit an injury upon her for which the owners of the *Butte* are primarily responsible. If the *McLeod* had been passing by the vicinity of the ways, engaged at the time of the injury in navigating the river; if she had been anchored in the vicinity, or within reach of injury, when the *Butte* was hauled out; if her presence at the point where she was injured had been due to any act or condition of things, other than the acts of Weaver & Co., it might perhaps be suggested—although we do not concede it—that the owners of the *Butte* owed her some duty. If, in other words, the condition of things which subjected the *McLeod* to the injury had been apparent, or might have been observed, at the time of the contract between Weaver & Co. and Power & Co., or at the time they surrendered their vessel to Weaver & Co., there might be grounds for claiming that it was their duty to have provided against a contingency either visible, or which might fairly be considered to be within their knowledge. But to say that these respondents were liable, under the facts in this case, for a condition of things brought about after the surrender of their vessel to Weaver & Co., and by the sole and unforeseen acts of Weaver & Co., is carrying the imposition of duty beyond any rule that we can discover to have been sustained in the books, and, we submit, beyond

any principle within reason or justice. And if such is the rule to be sustained, Power & Co. would be defenceless, even if the act of Weaver & Co. in permitting the collision had been wilfully and maliciously done.

Let another view of this case be taken, for a moment: Suppose the occurrences had taken place precisely as they are alleged and shown to have taken place in this case, and that the result had been the destruction of the *Butte*, without injury to the *McLeod*, could the owners of the *Butte* in that case have proceeded and recovered *in personam* against the owners of the *McLeod?* It will hardly be suggested that they could, and yet such must be the law in order to sustain this decree against Power & Co., unless the other view be taken, that Baker & Co. are wholly without fault and in nowise responsible for the acts of Weaver & Co. in dropping the *McLeod* down to the foot of the ways and leaving her moored there over night.

We now come to the question of the decree of the circuit court. The circuit court formulated its decree, dividing the damages between the parties, upon the authority of Atlee *v.* The Packet Co. (21 Wallace, 389). The opinion, in that case, does not, we submit, warrant the ruling which eventuated in this decree. In that case Atlee had, without authority of law and at his own risk, built a wharf or pier out into the navigable portion of the Mississippi river, and at a point where the river was being continually used for navigation purposes by vessels of different descriptions. A steamer engaged in navigating the river collided with the pier erected by Atlee, and was injured. In an action *in personam*, this court sustained a decree against Atlee for one-half the damages, the court holding the vessel and its crew to have been negligent, and thereby contributing to the injury so as to permit a division of the damages. It is well understood, of course, that the

admiralty rule does not defeat a recovery, where the plaintiff or libellant has been guilty of contributory negligence; but permits the court to divide or apportion the damages between the parties. This is a rule long established, and beneficial when the circumstances require its application, but it is, after all, a rule of law and is not intended to operate contrary to the justice of particular cases. It is sought in the case at bar to divert it from its proper purposes and predicate solely upon the rule a right to a recovery which could not be had except by a strained and unwarranted application of the rule.

An examination of the origin and history of this rule, which is elaborately considered in The Atlas opinion (93 U. S., 307), seems to warrant the assertion that it was made and is sustained upon a general policy believed by the courts to be applicable in cases of collision, and is founded upon a sound public policy. It is usually applied in proceedings *in rem*, rarely in proceedings *in personam*. The reason for the application of this rule in cases of collision is obvious; vessels are always used in the transportation of either freight or passengers—commonly both. In all cases a negligent act, producing a collision, involves danger to life and limb, as the crew of the vessel is necessarily, in every case, exposed to such danger. Under such circumstances a sound policy requires that the slightest deviation from that care which it is the duty of those in charge of vessels and engaged in navigating them to exercise, should be punished, and it is done in all cases by making either the vessels or the owners liable—the one solely in fault being held responsible for the actual damages sustained, while, where both vessels are in fault, the loss is divided equally between them. But when the reason for the application of such rule fails, the application is not made, and in the case at bar there is certainly no reason for its application. If, as

it is claimed, the rules and procedure in admiralty are intended to do full and adequate justice between parties, unaffected by technicalities or particular methods of proceedure which have grown up in other cases by reason of their multiplicity, it would seem that in the case at bar more exact justice would be arrived at by settling the rights of the parties according to the rules and usages of the laws applicable to negligences and injuries upon land, rather than by the application of rules and doctrines intended for another and entirely different class of business. In the case of the *Marianna Flora* (11 Wheat. 54), Justice Story said:

"Even in cases of marine torts, independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of municipal law. They have exercised a conscientious discretion upon the subject. A party who is *in delicto* ought to make a strong case to entitle himself to general relief."

And again, in the case of *The Palmyra* (12 Wheaton, 1):

"In the admiralty, the award of damages always rests in the sound discretion of the court, under all circumstances."

And later, in the case of the *Sarah Ann* (2 Sumner, 206), the same eminent authority declared that courts of admiralty, so far as their jurisdiction extends, administer it upon the principles of a court of equity, and not upon those of strict law.

It is very confidently asserted by counsel for libellants that the rule applied generally in towing cases should not be applied here. It is the settled doctrine of courts of admiralty that where the owner or master of a vessel in tow is not guilty of negligence, in a case of collision occurring where

the tug, instead of the tow, is in fault, there is no liability upon the tow *in rem* or upon its owners *in personam*. Counsel seem able to give no reason why that rule should not be applied in this case, except, "that towing is not dangerous, nor does it obstruct or render hazardous the highway, and is as different from the case at bar as driving domestic animals through the street differs from driving wild beasts, or a steam engine, through such street." And this position seems to be based entirely upon the assumption—for it is only assumption—by counsel for libellants, that the hauling of the *Butte* upon the ways at Bismarck was an act which was *per se* dangerous to the *McLeod*.

Now, it sufficiently appears from the case that the *McLeod* was in the custody, and wholly under the control, of Weaver & Co.; that she was by them placed at the foot of the ways solely for their own purposes; that she had no business there, and would not have been there had Weaver & Co. not placed her there, and that she would have received no injury from the *Butte* had she not been there. And we are forced to recur to our former position, which is, that these respondents should not be holden liable for an injury committed by Weaver & Co. upon the property of others placed in their care, and which they themselves had, for their own purposes, brought into a position where they could commit an injury upon it.

We submit, the case at bar is not a case of maritime collision; at the time of the accident both of the vessels were out of commission, their crews discharged and their business of navigating the Missouri river at an end for the season; the acts which Weaver & Co. were to perform as to them did not consist in their use or navigation but solely in their removal from their proper element and out upon the land; the proximate and impelling cause being the alleged act of negligence committed solely on land, the rule laid down in

the Atlee case should not apply, but the common-law rule applicable to cases of contributory negligence should control.

People's Ferry Co. *v.* Beers, 20 How., 399.
Roach et al. *v.* Chapman et al, 22 How., 129.
Morewood et al *v.* Enequist, 23 How., 492.
Bondies et al *v.* Sherwood et al, 23 How., 214.
Edwards *v.* Elliott, 21 Wall., 532.
The Steamboat Hendrick Hudson, 3 Ben., 419.
Young et al *v.* The Ship Orpheus, 2 Cliff., 29.

In view of the situation of the *Butte*, the mooring of the *McLeod* at the foot of the ways was an act of contributory negligence.

In conclusion, it may be observed that at no stage of this case is the connection between Power & Co. and Weaver & Co. pointed out, and no reason is assigned, why, as a legal proposition, Power & Co. should be held answerable for their acts. There is no pretence that Weaver & Co. are not amply responsible. There is no suggestion that the owners of the *Butte*, or any of their employees, contributed, in any way, to this injury, or that it could have been prevented or guarded against by them.

In the case of *The Vianna* (Swabey's Adm. 405), cited by counsel for libellants, the liability in case of launch is placed upon the *builder* of the ship and not upon the owner.

In this case the liability should be placed upon Weaver & Co. alone and not upon the owners of the vessel.

We respectfully submit that under these circumstances, at the very farthest, the rule adopted in Stainback *v.* Rae, (14 How. 532), and reiterated in *The Morning Light* (2 Wall. 550), and ~~Cushing et al. v.~~ *The John Fraser*, (21 Howard 184), should be adopted as between these owners, because as to them, and each of them, the injury, if any, was the re-

sult of inevitable accident, "and, in judgment of law, is not attributable to the fault of either party."

The decree of the circuit court should be reversed.

C. D. O'BRIEN,
WM. H. BLISS,
Counsel for T. C. Power et al.

Supreme Court of the United States.

OCTOBER TERM, 1887.

THOMAS C. POWER et al.,
Appellants,
v.
ISAAC G. BAKER et al.,
Appellees.
} *No. 157.*

ISAAC G. BAKER et al.,
Appellants,
v.
THOMAS C. POWER et al.,
Appellees.
} *No. 307.*

Petition of Power et al. for Rehearing.

C. D. O'BRIEN AND
WM. H. BLISS,
Counsel for Power et al.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1888.

Supreme Court of the United States.

OCTOBER TERM, 1887.

THOMAS C. POWER ET AL., APPELLANTS,
v.
ISAAC G. BAKER ET AL., APPELLEES.
No. 157.

ISAAC G. BAKER ET AL., APPELLANTS,
v.
THOMAS C. POWER ET AL., APPELLEES.
No. 307.

The Petition of Thomas C. Power et al. *for Rehearing.*

These were cross-appeals in admiralty.

The judgment below has been affirmed by this court, at the present term, on the ground that the record does not contain the finding of facts required by the act of February 16, 1875, and that there is, therefore, no question presented for revision.

a special verdict, but the jury make certain findings, and the statement is, that the court reserves the three points stated; and each point reserved is stated in one and the same form, namely, that if the court should be of opinion that the shells are dutiable thus and so, or are free from duty, then judgment is to be entered for the plaintiff for a special sum. As the circuit court, and the counsel for both parties in that court, appear to have treated the findings and the reservation as amounting to either a special verdict or an agreed statement of facts, we are disposed to overlook the irregularity, and to consider the case on its merits."

In the case of Insurance Company *v.* Tweed (7 Wall., 50), it was held that the opinion of the court below could not be accepted as a sufficient finding of the facts required by the act of March 3, 1865 (13 Stat., 501), and within the general rule on the subject, without aid outside of the record. The opinion in question did not profess to be a statement of facts, but was called in the transcript "reasons for judgment." The court say: "But the counsel for both parties in this court have agreed to certain parts of that opinion as containing the material facts of the case, and to treat them here as facts found by the court; inasmuch as they could have made such an agreement in the court below, we have concluded to act upon it here as if it had been so made."

If the requirement of the act of 1865, that the court shall find the facts, is satisfied by the agreement of counsel here that the "reasons for judgment" shall stand for the finding required by the act, then, petitioners submit, the agreement here by counsel in this cause, that the facts found and stated in the opinion of the district court shall be treated here as facts found by the circuit court, which agreement they could have made in the court below, ought to satisfy the like requirement of the act of 1875.

This is not a case where no finding of facts appears on the record to have been the subject of consideration. The find-

ing of the district court has been treated throughout as the finding of the circuit court, counsel on both sides appeared in this court in the belief that such finding was a substantial compliance with the law, have agreed, as an examination of their briefs will show, that such finding should stand as the finding of the circuit court, and it is respectfully submitted that, in view of the clear understanding and intention of both parties, the affirmance of the judgment below is too severe a penalty to be inflicted upon petitioners for the omission of their counsel in the court below to request the court to formally find and state the facts anew.

Petitioners are advised by their counsel that, in their opinion, the peculiar features of this case, as stated above, and which were not brought to the attention of this court at the time of affirmance of the judgment, should entitle petitioners to be heard upon the merits of this cause.

Respectfully submitted.

C. D. O'BRIEN,
WM. H. BLISS,
Counsel for Petitioners.

FEBRUARY 20, 1888.

Supreme Court of the United States.

I. G. BAKER, et al.
Respondents,

vs.

T. C. POWERS, et al.
Appellants.

#1168

Motion to Vacate Supersedeas.

JAMES H. DAVIDSON,
Proctor for Respondents.

WILLIAMS & DAVIDSON,
Counsel.

ST. PAUL:
H. M. SMYTH PRINTING CO.
1884.

Supreme Court of the United States.

I. G BAKER, et al
Respondents,
vs.
T. C. POWERS, et al.
Appellants.

IN ADMIRALTY.

E. G. Rogers, Proctor for Appellants.
O'Brien & Wilson, Counsel.

Take notice, that upon the records and files in this cause and the affidavit of James H. Davidson, a copy of which is herewith served upon you, a motion will be made in said cause on Monday, the 24th day of November, A.D. 1884, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order vacating the alleged supersedeas in this cause, and directing the Circuit Court for the District of Minnesota to proceed to enforce the decree entered in this proceeding.

Respectfully,

JAMES H. DAVIDSON,
Proctor for Respondents.

WILLIAMS & DAVIDSON,
Counsel.

Supreme Court of the United States.

I. G. BAKER, et al.
Respondents,
vs.
T. C. POWERS, et al.
Appellants.
} IN ADMIRALTY.

District of Minnesota,—ss.

James H. Davidson, being duly sworn, says he is a proctor of the respondents herein. That the cause was on the calendar of the Circuit Court for hearing at the December term, 1882, of said court and submitted to Judge McCrary of said court, and he decided that libellants should recover one-half their damages. Afterwards on application of respondents the court granted a rehearing, and the cause was again argued before his honor Judge Miller of this court, at the June term, 1883, of said Circuit Court. His honor affirmed the decision of Judge McCrary. The cause was referred to a commissioner and a decree entered Oct. 15, 1883, in favor of libellants for $9,572.82. The June term closed Dec. 8, 1883. At the next term of said court

and on January 14, 1884, appellants herein served on the proctors for libellants a petition for an appeal to this court, dated January 10, 1884, and the usual citation, dated, signed and served January 14, 1884. An order was entered January 10, 1884, as of Dec. 21, 1883, *nunc pro tunc*, allowing the appeal. Affiant is informed by proctors for appellants herein, that an appeal bond was presented to the Circuit Court for approval Dec. 21, 1883. An application for execution was made to the Circuit Court and refused, upon the ground that the matter should be decided by this court, and the Circuit Court refuses to enforce the judgment herein. Judgment was entered against the stipulators on the stipulation given by appellants herein on the 8th day of July, 1884, for the sum of five thousand dollars, the penal sum mentioned in such stipulation.

James H. Davidson

Subscribed and sworn to before me,
November 8 A.D. 1884.

Oscar B. Hillis
Clerk

(Seal)

U. S. SUPREME COURT.

I. G. BAKER, et al.
Respondents,

vs.

T. C. POWERS, et al.
Appellants.

Brief of Respondents on Motion to Vacate Alleged Supersedeas.

The statutes regulating appeals are:

The Judiciary Act of 1789, Sec. 22 and 23.
Act of June, 1872. (See 19 Wallace 427.)
The Revision of 1873, Sec. 692, 1007, 1012.

The amendments to these provisions do not affect the question.

There was no compliance with the Act of 1789. No writ was left in the clerk's office, or citation filed within the prescribed time.

The Act of 1872 was not complied with. The bond was not presented within the sixty days prescribed.

The Revised Statutes, Sec. 692, 1007, 1012, we understand contain the rules governing this case.

The appeal having been taken after the term at which the decree was entered was adjourned, something more than merely presenting a bond, Dec. 21, on a decree entered Oct. 18, was necessary.

We cite:

Sage v. R. R. Co., 83 U. S. 416.
Same, 96 U. S. 714.
City of Washington v. Dennison, 22 How. 87.
R. R. Co. v. Harris, 7 Wall. 574.

As to the judgment against the stipulators:

Judgment was entered, June term, 1884, against them for $5,000, the amount of their stipulation.

No appeal has been or can be taken from this judgment, being for $5,000 only.

JAMES H. DAVIDSON,
Proctor for Libellants.

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24-167

NOV 24 1884
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

I. G. BAKER, et al.,
Respondents,
vs.
T. C. POWER, et al.,
Appellants.

BRIEF OF APPELLANTS ON MOTION TO VACATE SUPERSEDEAS

E. G. ROGERS,
Proctor for Appellants.

O'BRIEN & WILSON,
Proctors for Appellants in the Court below, and of Counsel.

ST. PAUL:
W. T. RICH, PRINTER,
1884.

SUPREME COURT OF THE UNITED STATES.

I. G. BAKER, et al.,
Respondents,
vs.
T. C. POWER, et al.,
Appellants.

BRIEF OF APPELLANTS ON MOTION TO VACATE SUPERSEDEAS.

The final decree in this cause was entered on the 18th day of October, 1883; on the 21st of December, 1883, the supersedeas bond was duly executed, filed approved and allowed by the Hon. George W. McCrary, Judge of the Circuit Court.

This bond was filed within fifty-five days from the date of the entry of the decree, exclusive of Sundays.

The total number of days from the 18th of October to the 21st of December is sixty-four. In this period there occur nine Sundays, which leaves fifty-five days, and the bond was duly accepted and approved within that time.

And thereafter, and within the dates stated in the affidavit of Mr. Davidson, further steps to perfect the appeal were taken.

Proctors for the respondents had notice and knowledge of the filing and approval of the bond during the entire time.

The filing and approval of the bond and acceptance of the security by Judge McCrary was an allowance of the appeal.

See Sage vs. Railroad Co., 96 U. S., 712.

Opinion of the Court, pp. 714, 715.

In addition the record shows that the respondents have duly appeared, and such appearance waives all defects.

The motion should therefore be denied.

E. G. ROGERS,

Proctor for Appellants.

O'BRIEN & WILSON,

Proctors for Appellants in the Court below, and of Counsel.

SUPREME COURT OF THE UNITED STATES.

I. G. BAKER et al.,
Respondents,
vs.
T. C. POWER et al.,
Appellants.
} In Admiralty.

DISTRICT OF MINNESOTA, ss.

C. D. O'Brien, being duly sworn, doth depose and say: That he is one of the proctors for the appellants herein; that deponent has read the affidavit of James H. Davidson upon the motion for the vacation of the supersedeas heretofore granted in said cause; that in said cause judgment was originally entered in the District Court of the United States for the District of Minnesota in favor of the appellants herein; that thereupon on appeal to the Circuit Judge of the Circuit Court of the United States for the said District, said decision was reversed and judgment ordered for the libellants for the amount stated in the affidavit of the said Davidson; that thereafter and on the 21st day of December, 1883, and within sixty days, exclusive of Sundays, from the date of said decree, the supersedeas bond was duly presented, approved, allowed and

filed in said cause in said Circuit Court, and that thereafter such proceedings were duly had that an order was entered in said cause on the 10th day of January, 1884, allowing the appeal, but that previous to said order and on the 21st day of December, 1883, said supersedeas bond had been as aforesaid duly filed, allowed and approved.

Deponent further says that the delay in perfecting said appeal and in procuring the order therein, occurring between the 21st day of December, 1883, and the 10th day of January, 1884, was entirely and wholly on account of the statements made to the proctors for the appellants by Henry L. Williams, Esq., one of the proctors for said respondents, who had charge of said cause. That said Williams during and prior to said time and after the entry of said decree, and both before and after the 21st day of December, 1883, stated to this deponent that the proctors for said appellants could take such reasonable time as they saw fit to perfect said appeal, as the said Williams was desirous of having said cause appealed on the part of the respondents herein for the reason that he believed that the respondents were entitled to the entire amount of said claim instead of one-half thereof, and that said delay aforesaid occurring in said cause was solely and entirely due and owing to said statements and position of said Williams.

Deponent further states that the judgment against the sureties was entered in said cause at the time stated

in the affidavit of said Davidson, ex parte, and without notice to the proctors for the appellants, and upon an application to a Judge of the District Court and not to the Judge who had approved said supersedeas bond and allowed said appeal. That thereafter two applications were made to said Circuit Court to vacate said supersedeas by said respondents, which said applications were originally both ex parte, but as to which the Circuit Judge, Mr. Justice Brewer, required argument, and after such argument, duly had before him, denied said applications.

That said supersedeas bond is ample and more than sufficient to secure said judgment, should the same be affirmed, upon said appeal, and that the vacation of said supersedeas will operate greatly to the injustice and detriment of said appellants.

And further deponent saith not.

C. D. O'BRIEN.

Subscribed and sworn to before me this 15th day of November, 1884.

DANIEL B. VERMILYE,
Notary Public, Ramsey Co., Minn.

Seal.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 307.

ISAAC G. BAKER et al.,

APPELLANTS,

V.

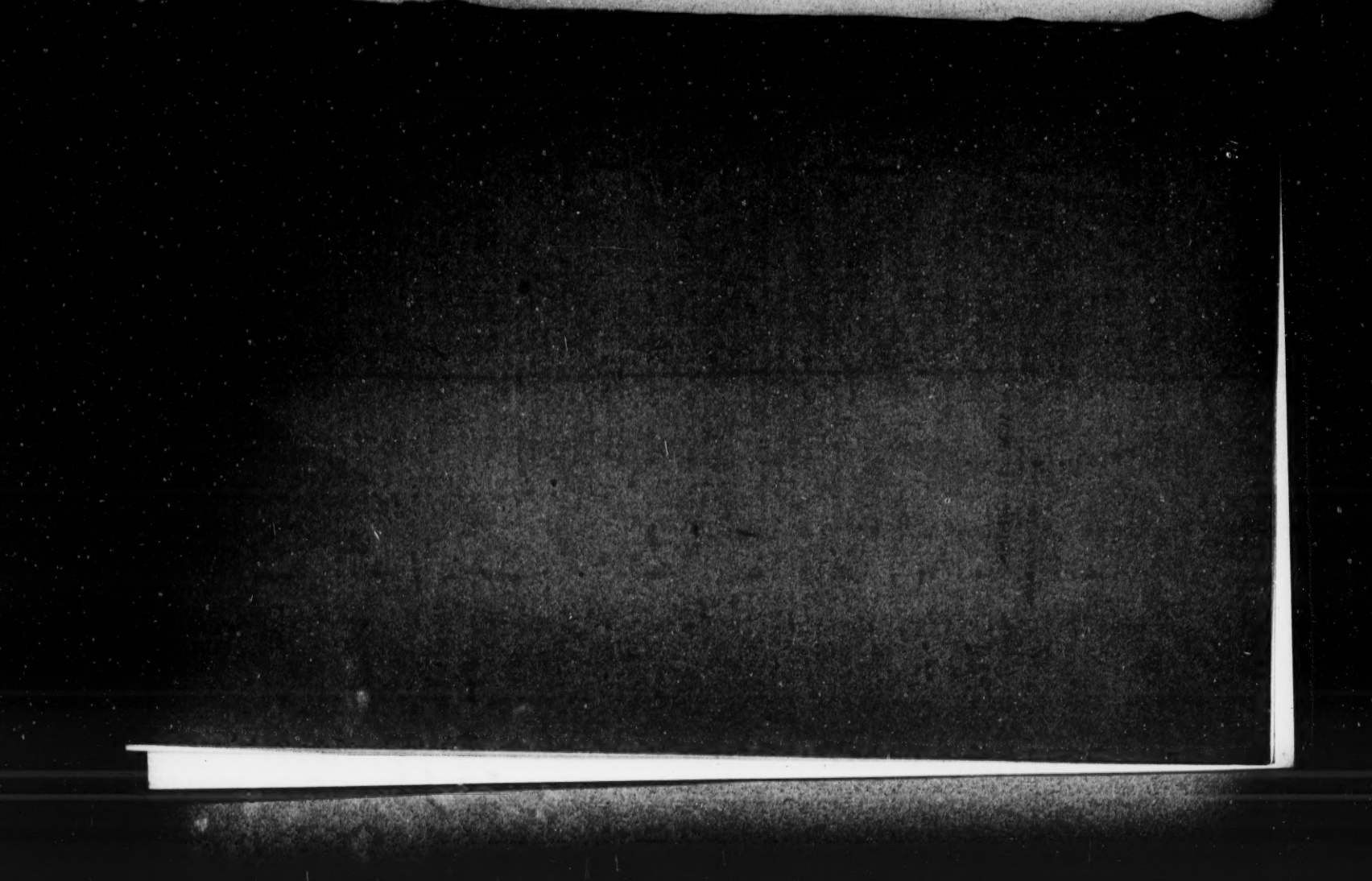
THOMAS C. POWER et al.,

APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF MINNESOTA.

Motion of Appellees to Dismiss, and Brief.

WM. H. BLISS,
of Counsel.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

ISAAC G. BAKER ET AL.,
APPELLANTS,

v.

THOMAS C. POWER ET AL.,
APPELLEES.

No. 307.

Now come the appellees and move the court to dismiss the appeal in this case for want of jurisdiction, because the judgment in the circuit court of the United States for the district of Minnesota, from which this appeal was taken, was rendered, without consent of appellees, by the judge of the United States district court for said district, sitting in the circuit court, upon an appeal from his decision as said district judge.

WM. H. BLISS,
of Counsel for Appellees.

STATEMENT.

Appellants filed a libel in admiralty against appellees in the United States district court for the district of Minnesota to recover damages alleged to have been sustained by collision, &c.

The district court dismissed the libel, and libellants appealed to the circuit court.

(pp. 220–1–2, Record).

The circuit judge reversed the decree of the district court, and ordered the cause referred to a commissioner to examine proofs and report to the court the amount of damages (p. 223, Record).

On a rehearing before the circuit justice the decree and order of reference was sustained (p. 225, Record).

The commissioner's report was confirmed by the district judge holding circuit court, and a judgment rendered by him, without consent of parties (pp. 225–6, Record), from which judgment this appeal was taken.

Argument.

Can a district judge render judgment in the circuit court in a case appealed from his decision? If not, then the judgment from which this appeal was taken is not a final judgment, and the appeal must be dismissed.

The very fact that the circuit court is the appellate tribunal precludes the idea of the participation of the district judge, in any way, in a case of appeal.

Section 614, Revised Statutes, is as follows: "A district judge, sitting in a circuit court, shall not give a vote in any case of appeal or error from his own decision, but may assign the reasons for such decision: *Provided*, That such a cause may, by consent of parties, be heard and disposed of by him when holding a circuit court sitting alone. When he holds a circuit court with either of the other judges, a judgment or decree in such cases shall be rendered in conformity with the opinion of the presiding justice or judge."

The intent and purpose of the enactment (1 Stat., p. 74, § 4), as it stood until amended in 1867 (14 Stat., p. 545, § 2), was to disqualify a district judge from sitting in cir-

cuit and performing any judicial act in an appeal from his decision below.

The amendment of 1867 modified the act by providing, that in case of the absence of the circuit justice, and by consent of parties, the district judge might hear and dispose of the cause. Prior to the amendment he could not, under any circumstances, vote in the cause; he could neither hear nor dispose of the cause; hence, presumably in order to facilitate the transaction of the business of the courts, this proviso was enacted.

If, prior to that date, the district judge could participate in the proceedings, could either hear or dispose of the cause, clearly there would have been no necessity for the amendment.

The law in question seems to have been before this court for construction, for the first and only time, in the case of Rodd *v.* Heartt (17 Wall., 354), which was a motion to dismiss for want of jurisdiction based upon the ground, among others, that the appeal was from a decree of the circuit court, reversing a decree of the district court, and was allowed by the district judge. It was held that, "though upon appeals from the district court the district "judge has no vote in the circuit court, he has, in all "other respects, the powers of a member of the court, "and may, consequently, allow appeals from its decisions." That is to say, after the decision of the presiding circuit judge has been rendered and final judgment entered by him (as the record in Rodd *v.* Heartt shows was the case), the cause is disposed of, and the granting of an appeal from that judgment by the district judge cannot, under any possible construction, be said to be a participation in the proceedings on the appeal from his decision below.

Respectfully submitted.

WM. H. BLISS,
for Appellees.

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21-167

Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 307.

ISAAC G. BAKER ET AL.
Appellants,

vs.

THOMAS C. POWER ET AL.

MOTION TO DISMISS APPEAL.

APPELLANTS' BRIEF.

JAMES H. DAVIDSON,
for Appellants.

HENRY L. WILLIAMS,
Counsel.

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Motion to Dismiss Appeal.

APPELLANTS' BRIEF.

I.

A judgment was entered in the records of the United States Circuit Court by the clerk thereof (p. 225, Record), pursuant to an adjudication upon the merits of the cause by Justice Miller (p. 225, Record), affirming a previous decision by McCrary, circuit judge (p. 223, Record), and an order made by McCrary, circuit judge, confirming the commissioner's report (p. 224, Record). From that judgment both parties appealed. If the district judge took part in the trial and determination of the cause contrary to law, that may be ground for reversal, but is no ground for dismissing the appeal.

We wish to be heard upon all the questions for a reversal of the decree that can be raised. That a decree was actually entered cannot be denied.

Whether the judgment is correct is the question before the court, and we respectfully submit should be decided after a hearing and not on a motion to dismiss the appeal.

II.

We affirm that the district judge took no part whatever in the hearing or determination of the cause in the circuit court. It was finally decided by Justice Miller, referred to a commissioner pursuant to the decision. The district judge had no vote in the matter. The commissioner filed a report in writing, which was confirmed by order of McCrary, circuit judge (p. 224, Record). The clerk of the court thereupon formally entered the decree pursuant to the decision.

District Judge Nelson happened to be on the bench upon the day the decree was so formally entered upon the records. There was nothing left for him to determine judicially. We submit that there was no reason why the decree should have been entered in term time. It might have been entered by the clerk upon the coming in and confirmation of the commissioner's report. We think Rudd vs. Heartt, cited by counsel for appellee, covers this case: "Though upon appeals from the district court the district judge has no vote in the circuit court, he has, in all other respects, the power of a member of the court."

Respectfully submitted.

JAMES H. DAVIDSON,
for Appellants.

HENRY L. WILLIAMS,
Counsel.